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### Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions

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*During the past half century, constitutional theories of religious freedom have been in a state of great controversy, perpetual transformation, and consequent uncertainty. Given the vitality of religious faith for most Americans and the vigor of the enduring debate on the proper role of religious belief and practice in public society, a searching exploration of the influences upon judges in making decisions that uphold or reject claims implicating religious freedom is long overdue. Many thoughtful contributions have been to the debate about whether judges should allow their religious beliefs to surface in the exercise of their judicial role. Yet much less has been written about whether judges' religious convictions do affect judicial decrees, that is, whether religious beliefs influence court decisions, consciously or unconsciously. In this comprehensive empirical study of federal circuit and district judges deciding religious freedom cases, the vitality of religious variables to a more complete understanding of judicial*

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*decisionmaking became abundantly clear. Indeed, the single most prominent, salient, and consistent influence on judicial decisionmaking was religion—religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community, independent of other background and political variables commonly used in empirical tests of judicial behavior. Thus, in light of the findings of this study, when searching for the soul of judicial decisionmaking in the legal or political sense, we must not neglect the presence and influence upon the judicial process of matters that affect the soul in the theological sense.*

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## I. INTRODUCTION

During the past half century, and especially during the last three decades, constitutional theories of religious freedom have been in a state of great controversy, perpetual transformation, and consequent uncertainty. Given the vitality of religious faith for most Americans and the vigor of the enduring debate on the proper role of religious belief and practice in public society, a searching exploration of the influences upon judges in making decisions that uphold or reject claims implicating religious freedom is long overdue.

In the absence of clear precedential constraint, what might motivate a judge to smile upon the religious dissenter who seeks to avoid the burden of a legal requirement that conflicts with what he or she regards as the obligation of faithful belief? What experiences or attitudes might persuade a jurist to frown upon a specific example of governmental accommodation of religiously-affiliated institutions and instead insist upon a strict exclusion of what he or she regards as inappropriate sectarian elements from public life? Most poignantly, might the judge's own religious upbringing or affiliation influence his or her evaluation of religiously grounded claims that implicate those beliefs?<sup>1</sup>

Over the past several years, many thoughtful contributions have been made to the legal, political, philosophical, and theological debate about whether judges *should* allow their religious beliefs to surface in the exercise of their judicial role or instead should be constrained to rely upon and report only secular justifications for court decisions.<sup>2</sup>

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<sup>1</sup> See Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 701 (1997) (suggesting that, especially in the area of religious freedom, a balancing approach to decisionmaking is dangerous and allows "intuitive judgments" that "are likely to be unacceptably subjective" because "[r]eligion is a matter on which people, judges included, tend to have gut feelings that often are inarticulate but nevertheless can powerfully affect their outlooks").

<sup>2</sup> See, e.g., KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* 141-50 (1995) (arguing that a judge should give priority to generally "shared premises and ways of reasoning" and, with rare exception, should disregard religious convictions in making

Yet much less has been written about whether judges' religious convictions *do* affect judicial decrees, that is, whether religious beliefs influence court decisions, consciously or unconsciously.<sup>3</sup> As Scott Idleman observes, we need to determine:

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decisions); MICHAEL J. PERRY, *RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES* 102–03 (1997) (contending that, in the context of adjudication, if the legal materials are “underdeterminate” such that reliance on nonlegal norms is necessary to resolve the case, then a judge may openly rely on a religious premise as long as “a plausible secular premise” also supports the choice); Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 933 (1989) (arguing that “reliance by judges on their personal religious convictions is as proper as reliance on their personal moral convictions of any other kind”); Teresa S. Collett, “*The King’s Good Servant, But God’s First*”: *The Role of Religion in Judicial Decisionmaking*, 41 S. TEX. L. REV. 1277, 1299 (2000) (arguing that “[j]udges should be free to draw upon the wisdom contained in various religious traditions” and that such reliance should be restricted “[o]nly where such wisdom conflicts with the political choices embodied in the positive law”); Daniel O. Conkle, *Religiously Devout Judges: Issues of Personal Integrity and Public Benefit*, 81 MARQ. L. REV. 523, 523, 530 (1998) (arguing that “[t]he use of certain sorts of religious values can potentially enhance the process of judicial decisionmaking,” but that this is beneficial to the public only when “the religious values themselves are sound or unsound, just or unjust”); John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 303 (1998) (suggesting that, in the context of death penalty cases, Catholic judges face a conflict between their obligation “by oath, professional commitment, and the demands of citizenship to enforce the death penalty” and their obligation “to adhere to their church’s teaching on moral matters,” which may compel conscientious Catholic judges to recuse themselves in certain cases); Mark B. Greenlee, *Faith on the Bench: The Role of Religious Belief in the Criminal Sentencing Decisions of Judges*, 26 U. DAYTON L. REV. 1, 3 (2000) (arguing that “religious beliefs exert a powerful directing influence upon the sentencing decisions of judges and that judges should not be barred from referring to religious texts . . . so long as they act in accord with the norms of the judicial office they hold”); Wendell L. Griffen, *The Case for Religious Values in Judicial Decision-Making*, 81 MARQ. L. REV. 513, 514 (1998) (contending from the perspective of a state appellate judge that “the public policy process is [not] necessarily threatened when judges include religious values in judicial decision-making, despite the considerable discomfort that is express in liberal political theory”); Scott C. Idleman, *The Limits of Religious Values in Judicial Decisionmaking*, 81 MARQ. L. REV. 537, 537–38 (1998) (observing that the proper use of religious values by judges depends upon important foundational questions about the meaning of religion, the nature of the judicial decisional process, and the constraints imposed by the Constitution, political theory, and prudence); Mark Modak-Truran, *The Religious Dimension of Judicial Decision Making and the De Facto Disestablishment*, 81 MARQ. L. REV. 255, 256–57 (1998) (presenting “the thesis that judicial deliberation necessarily relies on a comprehensive or religious conviction about authentic human existence in hard cases” but that judges should not disclose these claims in opinions). Indeed, some have even questioned the propriety of a jurist expressing strong religious views in an extra-judicial context. See Michael Stokes Paulsen & Steffen N. Johnson, *Scalia’s Sermonette*, 72 NOTRE DAME L. REV. 863 (1997) (responding to criticisms of Justice Scalia’s exhortation of religious belief to a private audience and defending the right of a judge to make statements of personal religious belief off the bench).

<sup>3</sup> Filling a hole in the literature on the Supreme Court, interesting works have been published recently from historical perspectives that explore the interaction between religious

whether and to what extent religious values do in fact influence the decisionmaking of judges, without regard to any normative or theoretical formulations of that relationship. The importance of this premise is obvious, as the worth of any model of judging must in part be measured by its correspondence to actual judicial practice.<sup>4</sup>

To be sure, valuable empirical work has been done, both on judicial attitudes toward church-state issues arising in litigation<sup>5</sup> and on the influence of religious background on judges in general decisionmaking.<sup>6</sup> But focused studies have been few and many are decades old.<sup>7</sup> And most pertinent studies tend to collapse religious freedom disputes together with other First Amendment or civil liberties cases for analysis and evaluate those decisions narrowly on a liberal-conservative dichotomy.<sup>8</sup>

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faith and judicial actions of certain religiously devout Supreme Court justices. *See, e.g.*, Thomas C. Berg & William G. Ross, *Some Religiously Devout Justices: Historical Notes and Comments*, 81 MARQ. L. REV. 383 (1998); J. Gordon Hylton, *David Josiah Brewer and the Christian Constitution*, 81 MARQ. L. REV. 417 (1998). As an interesting counter-example, Sanford Levinson has observed that Catholic nominees to the Supreme Court in recent decades have felt obliged during the nomination process to disavow the relevance of their religious views to their judicial work, saying that "Justices identified with Catholicism have been forced to proclaim the practical meaninglessness of that identification." Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1049 (1990).

<sup>4</sup> Idleman, *supra* note 2, at 543.

<sup>5</sup> *See, e.g.*, C. K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN THE FEDERAL DISTRICT COURTS* 40 (1996) (finding a difference between Democratic and Republican-appointed federal district judges of 24% on religion cases).

<sup>6</sup> *See, e.g.*, Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 505 (1975) (reporting that Catholic judges tended to be more liberal on economic issues, although the correlation was weak); S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947-1956 Terms*, 17 AM. J. POL. SCI. 622, 625 (1973) (finding three factors, age at appointment, federal administrative experience, and religious affiliation, have some explanatory value for decision variance in a sample of fourteen United States Supreme Court justices).

<sup>7</sup> An important exception to the general neglect of this subject in the empirical literature may be found in the recent study of Donald Songer and Susan Tabrizi which found that evangelical Christian state supreme court justices were significantly more conservative in death penalty, gender discrimination, and obscenity cases. Donald R. Songer & Susan J. Tabrizi, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. POL. SCI. 507, 520-23 (1999).

<sup>8</sup> *See, e.g.*, Robert A. Carp, Donald Songer, C.K. Rowland, Ronald Stidham & Lisa Richey-Tracy, *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298, 299 (1993); Jon Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48, 50-51 (1986); Ronald Stidham, Robert A. Carp & Donald R. Songer, *The Voting Behavior of President Clinton's Judicial Appointees*, 80 JUDICATURE 16, 19-20 (1996).

No prior study to our knowledge has conducted a comprehensive analysis of both federal circuit and district judges with constitutional religious freedom issues at the center. Nor have prior empirical studies developed integrated models of judicial attitudes in practice toward the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution. Such a study is overdue.

The Religion Clauses of the First Amendment should be fertile ground for an empirical study of judicial decisionmaking:

With respect to the Establishment Clause, the Supreme Court adhered for decades, at least nominally, to the three-part *Lemon* test, by which governmental action must be supported by a secular purpose, must not have the primary effect of advancing or inhibiting religion, and “must not foster an excessive governmental entanglement with religion.”<sup>9</sup> Although originally reflecting a strict separationist view of the Establishment Clause, the *Lemon* test gradually was eroded and came to “resemble [] a constitutional Rorschach test, reflecting the often contradictory constitutional views of different observers.”<sup>10</sup> As Michael Paulsen metaphorically explains, “the ambiguity of the test left the Court leeway to interpret each prong in various ways, producing a bewildering patchwork of decisions as the justices engaged in a tug-of-war over the interpretation of the test.”<sup>11</sup>

At present, while maintaining a strict rule against direct government sponsorship of an explicitly religious message,<sup>12</sup> the Supreme Court appears to be moving away from a presumption against accommodation for religiously-affiliated entities in government programs and toward a more generous attitude about the role of religious institutions in public society<sup>13</sup>—but that movement has come in fits and starts and remains incomplete and uncertain. As recently as three years ago, the Court remained deeply divided and was unable to articulate a

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<sup>9</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

<sup>10</sup> Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 467 (1994); see also JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* 175 (1995) (arguing that the *Lemon* test generates “ad hoc judgments that are incapable of being reconciled on any principled basis”). But see Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998) (arguing that the Supreme Court’s case law follows a logical pattern when the Establishment Clause is conceptualized as a structural restraint on the government’s power, akin to the constitutional separation of powers, rather than as an individual right).

<sup>11</sup> Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 801 (1993).

<sup>12</sup> See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) (invalidating school district policy allowing students to vote on whether to include an invocation at football games).

<sup>13</sup> See generally Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 285 (1999) (describing “neutrality theory” under which religiously neutral social programs satisfy the *Lemon* test, to which the Supreme Court adheres with modifications).

majority vision of the Establishment Clause: A plurality of four justices broadly approved the participation of religiously-affiliated institutions in a governmental social welfare program as long as the program was neutral in application as between religious and secular entities;<sup>14</sup> two justices proposed something like a totality of the circumstances approach in which neutrality was an important but not determinative factor;<sup>15</sup> and three justices adhered to a stricter analysis that generally would bar religious organizations from participating in government social welfare programs.<sup>16</sup>

When scholars look back on this period in the Court's history, they may find that the Court's 2002 landmark decision in *Zelman v. Simmons-Harris*<sup>17</sup> finally provided a certain degree of stability to Establishment Clause doctrine,<sup>18</sup> given that a five justice majority managed to cleave together to uphold as "neutral" a school voucher program that allowed poor children in failing public schools to choose educational alternatives including private religious schools.<sup>19</sup> But from our perspective at this point in time, while the question of government-paid vouchers to allow children to attend religiously-affiliated schools (at least if some quantity of secular options also are available)<sup>20</sup> seems settled, the Court has yet to fully clarify the nature and scope of this constitutional limitation upon government interaction with religion and religious institutions. For the time being,

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<sup>14</sup> *Mitchell v. Helms*, 530 U.S. 793, 801–36 (2000) (Justice Thomas, Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy).

<sup>15</sup> *Id.* at 836–67 (Justice O'Connor and Justice Breyer).

<sup>16</sup> *Id.* at 867–913 (Justice Souter, Justice Stevens, and Justice Ginsburg).

<sup>17</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, Justice Kennedy, and Justice Thomas).

<sup>18</sup> Compare Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 163, 177, 192 (2002) (saying that the Supreme Court's answer to the validity of vouchers given in *Zelman* can be explained as "maybe or maybe not," given the "promise of persistence [of opposition to vouchers] by the bloc of four dissenting Justices," and thus concluding that "it is hard to claim that this case has brought stability to the law or definitively moved the issue [from the courts] to the political arena"), with Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 919 (2003) (contending that while "[t]he outcome in *Zelman*, decided by a vote of five to four, may have been close, . . . the question it answers has now been firmly resolved," and explaining that "the voucher decision both captures the trajectory of contemporary Establishment Clause jurisprudence and resolves a particular question in a way highly unlikely to be revisited").

<sup>19</sup> *Zelman*, 536 U.S. at 648, 653.

<sup>20</sup> See *id.* at 663 (O'Connor, J., concurring) (saying that, while joining the Court's opinion, it should be emphasized that the validity of vouchers depends upon whether "parents of voucher students in religious schools have exercised 'true private choice' " in light of "all reasonable educational alternatives to religious schools that are available to parents").



the Court appears likely to continue with a case-by-case analysis, "sifting through the details" and "particular facts of each case."<sup>21</sup>

In any event, the instability and nearly chaotic nature of Establishment Clause case law during the period relevant to our study, 1986–1995, was manifest.<sup>22</sup> In particular, the lower courts were left "especially confused about the current state of Establishment Clause law, and [were] often reduced" to applying various alternative tests in addition to the ambiguous *Lemon* test.<sup>23</sup>

Likewise, the doctrinal development under the Free Exercise of Religion Clause of the First Amendment has been episodic, lurching from a period during which (at least in theory) governments were obliged to establish a compelling interest before applying laws in a manner that burdened religious exercise,<sup>24</sup> to the present era in which a law of general application that is neutral in purpose will be upheld notwithstanding the severity of impact on the sincere practice of religious faith.<sup>25</sup> However, the Court has reserved the power to set aside government actions harmful to religion when formal neutrality is betrayed by underlying anti-religious bias as revealed by the underinclusiveness of a government directive, that is, when accommodations are granted for non-religious, but not religious, reasons.<sup>26</sup> In addition, while the Free Exercise Clause standing alone has been drained of much of its constitutional force, the Court has allowed that when the clause is invoked "in conjunction with other constitutional protections, such as freedom of speech and of the press or the right of parents . . . to direct the education of children," neutral and generally applicable laws may fall before religiously motivated action.<sup>27</sup> Thus, even in this time of

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<sup>21</sup> See *Rosenberger v. Rector*, 515 U.S. 819, 847, 852 (1995) (O'Connor, J., concurring) (arguing against adoption of a "single test" or "Grand Unified Theory" and saying that "[r]esolution instead depends on the hard task of judging—sifting through the details and determining whether [a challenged government activity] offends the Establishment Clause," an approach which "requires courts to draw lines, sometimes quite fine, based on the particular facts of each case"); Daniel O. Conkle, *Lemon Lives*, 43 CASE W. RES. L. REV. 865, 866 (1993) (arguing that, rather than "unworkable incoherence," the Court's context-specific analysis of different problems reflects "the exercise of judgment").

<sup>22</sup> See Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681, 686 (2001) (saying that "commentators of every jurisprudential stripe, on and off the Court, have criticized [the pre-*Mitchell v. Helms*, 530 U.S. 793 (2000)] line of cases for their incoherence and inconsistency") [hereinafter McConnell, *State Action*].

<sup>23</sup> STEVEN G. GEY, *RELIGION AND THE STATE* 237 (2001).

<sup>24</sup> See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (citing *NAACP v. Button*, 371 U.S. 415 (1963)).

<sup>25</sup> See *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990).

<sup>26</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532–40 (1993).

<sup>27</sup> *Smith*, 494 U.S. at 881–82.

presumptive judicial deference to governmental prerogatives over religious conscience, opportunities remain for successful free exercise challenges under certain narrower circumstances and when framed in alternative ways.<sup>28</sup>

Finally, there remains substantial sentiment on the Court to revisit the question of whether the Free Exercise Clause mandates that the government provide some measure of justification before trespassing upon religious practice.<sup>29</sup> The debate therefore persists on whether “the Free Exercise Clause is properly understood as an affirmative guarantee of the right to participate in religious activities without impermissible governmental interference, even where a believer’s conduct is in tension with a law of general application,”<sup>30</sup> or instead protects “the right to believe and profess whatever religious doctrine one desires”<sup>31</sup> but does not excuse an individual on the basis of religious belief “from compliance with an otherwise valid law prohibiting conduct that the [government] is free to regulate.”<sup>32</sup>

From the standpoint of an empirical study of the lower federal courts on questions of religious freedom, the Supreme Court’s inability to achieve consensus and its promulgation of malleable balancing tests or open-ended exceptions to rules is most fortuitous. Because of the high degree of instability and uncertainty in the doctrine, judges on the federal courts of appeals and the district courts have been afforded ample room for exercise of judgment in resolving religious freedom controversies. As a consequence, precisely because lower federal court judges are not shackled by the chains of determinate precedent from the high Court, an empirical study of the influences upon their decisions in this area is feasible and likely to bear fruit.<sup>33</sup>

The lower courts continue to render important decisions on the Religion Clauses of the First Amendment with powerful public consequences that attract

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<sup>28</sup> See generally Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 41 (1990) (identifying several exceptions to the *Smith* approach, including heightened protection of hybrid rights to free exercise and free speech or free exercise and parental rights and the requirements that legitimate laws be truly neutral and general in application); Note, *Sharing the Burden: Exploring the Space Between Uniform and Specific Applicability in Current Free Exercise Jurisprudence*, 77 TEX. L. REV. 753, 788 (1999) (arguing that a “large category of laws—those allowing secular departures [but not religious] from uniform applicability” remain vulnerable to Free Exercise Clause challenge and that “[t]he true impact of *Lukumi* is that [there are] more opportunities for successful free exercise claims than are possible in a space dominated by *Smith* alone”).

<sup>29</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 544–65 (1997) (O’Connor, J., dissenting, joined by Justice Breyer); *id.* at 565–66 (Souter, J., dissenting).

<sup>30</sup> *Id.* at 546 (O’Connor, J., dissenting).

<sup>31</sup> *Smith*, 494 U.S. at 877.

<sup>32</sup> *Id.* at 878–79.

<sup>33</sup> See Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 46 (2001) (“Where law and precedent provide weak guidelines rather than mandates, the judge’s decision is more likely to be the product of attitudes and environment.”).

scholarly attention, but which have not (as yet) been subject to definitive disposition in the Supreme Court.<sup>34</sup> Even in a field of such high visibility and importance as the Religion Clauses of the United States Constitution, only a small fraction of disputes will find resolution at the highest Court in the land. For the vast majority of Americans who assert that their religious freedoms have been infringed by governmental action, the lower federal courts—the courts of appeals and the district courts—prove to be the forums of final resort.<sup>35</sup>

The vitality of religious background to a more complete understanding of judicial decisionmaking is made abundantly clear by the findings of our study, at least for disputes involving the very topic of religion and the place of religion in public society. In our study, religion-based variables proved to be steady influences on judicial disposition of religious freedom claims, emerging as statistically significant across multiple models and independent of other background and political variables commonly used in empirical tests of judicial behavior. Indeed, religious affiliation variables—both those of judges and of claimants—were the most consistently significant influences on judicial votes in the religious freedom cases included in our study.<sup>36</sup>

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<sup>34</sup> See, e.g., *Religious Exceptions to Anti-Discrimination Laws: Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 717–18 (9th Cir. 1999) (enjoining enforcement of anti-discrimination statute against owners of residential rental properties who refused to rent to unmarried couples on religious grounds), *reh'g en banc*, 220 F.3d 1134, 1137 (9th Cir. 2000) (dismissing as not ripe for review), *cert. denied*, 531 U.S. 1143 (2001); Gary S. Gildin, *A Blessing in Disguise: Protecting Minority Faiths Through State Religious Freedom Non-Restoration Acts*, 23 HARV. J.L. & PUB. POL'Y 411, 454–57 (2000) (discussing *Thomas* decision); Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589, 629–35 (2000) (same); and *Religious Objections to Public School Curricula: Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1070 (6th Cir. 1987) (rejecting free exercise claim that children be allowed to opt-out of a reading program in public school that parents found offensive on religious grounds), *cert. denied*, 484 U.S. 1066 (1988); Thomas C. Berg, *State Religious Freedom Statutes in Private and Public Education*, 32 U.C. DAVIS L. REV. 531, 552–56 (1999) (discussing *Mozert* decision); Stephen L. Carter, *Religious Freedom as if Religion Matters: A Tribute to Justice Brennan*, 87 CAL. L. REV. 1059, 1083–84 (1999) (same); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 992–1000 (1996) (same); Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls*, 105 ETHICS 468, 470–75, 485–88 (1995) (same); Mark Tushnet, *In Praise of Martyrdom?*, 87 CAL. L. REV. 1117, 1121–22 (1999) (same).

<sup>35</sup> See DONALD R. SONGER, REGINALD S. SHEEHAN & SUSAN B. HAIRE, *CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS* 14–18 (2000) (explaining that “[s]ince the policy-making role of the Supreme Court is severely limited by the tiny portion of federal cases that it can hear, much of the development of precedent and the shaping of legal policy is left to the courts of appeals” and thus that the courts of appeals are the “final forum” for many matters).

<sup>36</sup> In all aspects of our study, the dependent variable for each model was the direction of an individual judge’s vote in a particular case, with a standard set of independent variables

In analysis of demands by religious claimants for exemption from governmental rules or regulations under the Free Exercise Clause of the First Amendment, together with related statutory, free speech, and equal protection claims, Jewish judges and judges from Christian denominations outside of the Catholic and Mainline Protestant traditions were significantly more likely to approve of such judicially-ordered accommodations,<sup>37</sup> while free exercise claimants from Catholic and Baptist backgrounds were significantly less likely to succeed in pressing such claims.<sup>38</sup> In evaluating judicial resolution of challenges to governmental interaction with religion under the Establishment Clause of the First Amendment, Jewish judges were significantly more likely to conclude that governmental interaction with religion breached the figurative wall of separation between church and state.<sup>39</sup> In the particular context of education, Catholic judges were significantly more likely both to respond favorably to religious claimants seeking exemption from governmental rules or regulations (that is, more approving of Free Exercise Clause objections to government controls) and to resist challenges to governmental acknowledgment of religion or interaction with religious institutions (that is, less approving of Establishment Clause claims).

Shifting from a focus upon particular types of claims to analysis of four integrated theoretical models of the Religion Clauses of the Constitution—models that we christened Pro-Religion, Anti-Political, Judicial-Restraint, and Pro-Secularist—the steady influence of religion-based variables again emerged in our study.<sup>40</sup> No significant variables were found among judges who adopted an approach toward the Free Exercise and Establishment Clauses that was most approving and accommodating of religion (the Pro-Religion Model) (although Catholic affiliation for judges closely approached significance).<sup>41</sup> Nor did those judges who fit the antithetical model of insisting upon secularism in public life (the Pro-Secularist Model) fall into any significant patterns (again with the near and negative exception of Catholic judges).<sup>42</sup> However, Jewish judges along with judges from non-mainstream Christian backgrounds were significantly more likely to approve of judicial intervention to overturn the decisions or actions of the political branch that either refused to accommodate religious dissenters or provided an official imprimatur upon a religious practice or symbol (the Anti-

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depending upon the pertinent model, consisting of variables on the legal claims raised, the factual nature of the case, the religious affiliation of the claimant, the religious affiliation of the judge, the religious demographics of the judge's community, the judge's ideology, and various background variables for the judges (as well as certain alternative measures that were used for comparison purposes). *See infra* Parts II–V.

<sup>37</sup> *See infra* Parts IV.A.1, V.A.1.

<sup>38</sup> *See infra* Part IV.A.3.

<sup>39</sup> *See infra* Parts IV.B.1, V.A.1.

<sup>40</sup> *See infra* Part II.

<sup>41</sup> *See infra* Part II.A.

<sup>42</sup> *See infra* Part II.D.

Political Model).<sup>43</sup> Likewise, judges from these same religious backgrounds were significantly less likely to adopt a judicial restraint approach (the Judicial-Restraint Model), that is, these judges were less likely to defer to governmental actions that severely impacted religious minorities or that officially acknowledged religious traditions.<sup>44</sup>

By contrast, across these multiple phases and models of study, the traditional variables used to measure judicial behavior—gender, race, educational background, employment background, and ideology—proved much less important, with certain notable exceptions discussed later (such as the not-surprising finding that Republican-appointed or more conservative judges were significantly less likely to invoke the Establishment Clause to overturn affirmative governmental interchange with or acknowledgment of religion).<sup>45</sup> At least in the context of religious freedom disputes in the lower federal courts, variables other than religious affiliation tended to fade into the background.

In sum, our study provides concrete evidence to support the observation by Donald Songer and Susan Tabrizi that “religious affiliation may provide a useful indicator of judicial values that has been ignored by previous studies examining the impact of judges’ values on their decisions.”<sup>46</sup>

## II. THEORIES OF RELIGIOUS FREEDOM—“PRO-RELIGION,” “ANTI-POLITICAL,” “JUDICIAL-RESTRAINT,” AND “PRO-SECULAR” MODELS

As the centerpiece of our study, we developed four theoretical models for an integrated perspective on the Religion Clauses of the United States Constitution.<sup>47</sup> As Thomas Berg observes, such an approach has the merit of treating “the Religion Clauses as a unified pair,”<sup>48</sup> and indeed those clauses are joined as a single sentence in the very text of the First Amendment.<sup>49</sup>

Each of these models thus combines the separate but intertwined strains of Free Exercise Clause and Establishment Clause decisions into one category, allowing a more comprehensive or holistic analysis of judicial attitudes on religious freedom. We outline each of these four models below and, at the risk of identifying this model too closely with one person and neglecting the judicial and

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<sup>43</sup> See *infra* Part II.B.

<sup>44</sup> See *infra* Part II.C.

<sup>45</sup> See *infra* Part V.

<sup>46</sup> Songer & Tabrizi, *supra* note 7, at 507.

<sup>47</sup> As discussed below, we also included in our study separate analyses of the outcomes in Free Exercise Clause and Establishment Clause cases, including subcategories of types of cases. See *infra* Parts IV.A–IV.B.

<sup>48</sup> Berg, *supra* note 1, at 700.

<sup>49</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

scholarly contributions of others, provide an example of one leading scholar or member of the Supreme Court who largely adheres to that particular model.<sup>50</sup>

As summarized in the introduction to this Article, no significant correlation between judicial outcome and various independent variables was uncovered with respect to the theoretical model that is most approving and accommodating of religion and religious practices (although Catholic affiliation for judges approached significance). For the model that is most skeptical of political decisions regarding religion—whether those decisions deny accommodation to religious dissenters or formally acknowledge or suggest public approval of certain religious practices or traditions—Jewish judges and judges from non-mainstream Christian backgrounds were significantly more likely to approve of judicial intervention. Likewise, judges from these religious backgrounds were significantly less likely to adhere to the Judicial-Restraint Model, a model that exemplifies deference to governmental decisions regardless of impact on religious observance or extent of intermingling between Church and State.

#### A. “Pro-Religion/Accommodationist” Model (PRO-REL)

##### 1. Theoretical Basis for Pro-Religion Model

Our first model, which we have labeled “Pro-Religion/Accommodationist” is one that combines a favorable view of claims by religious adherents under the

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<sup>50</sup>In developing a four-part typology of the Religion Clauses that can be objectively defined and thereby operationalized in an empirical study, we necessarily created pure types or absolute points that do not perfectly correspond to the viewpoints taken by any actual jurist or scholar, given the complexity of theory, contextual variation, dependency on prior precedent, etc. that is part of any endeavor in human reasoning and judging. Even the scholars and jurists that we have selected as the exemplars of the four theoretical models outlined below depart to a greater or lesser degree from that model; to do full justice to their positions requires an appreciation of nuance beyond what we can provide in a general description. Moreover, these four models describe opposite points on a spectrum or distinctly different cells in a two-dimensional table, while many will find themselves falling somewhere in between. For example, after reviewing an earlier draft of this Article, Carl Esbeck described his own current views as a “hybrid” of the Pro-Religion and Anti-Political models outlined below. Esbeck accepts the label of “separationist” with respect to the Establishment Clause, as he finds accommodationism in terms of allowing legislative prayer and municipal-sponsored nativity scenes to be misguided, but still insists that the principle of neutrality permits (perhaps requires) government aid to religious institutions if treated on equal terms with all other educational and social service providers. Esbeck, *supra* note 13, at 288 n.13; *see also* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997) (outlining a similar theoretical position on the Religion Clauses, that is, one that combines separationism and neutrality). Nonetheless, the fact that many or even most jurists or scholars will fall somewhere in the middle does not detract from the usefulness of these models for empirical study, precisely because they are designed to measure judicial tendencies toward or away from certain points defined so as to provide for clear variation.

Free Exercise Clause with an accepting view of efforts by government to acknowledge or affirmatively interact with religion in public life as compatible with the Establishment Clause.<sup>51</sup>

Law and religion scholar and federal appellate Judge Michael McConnell has been a preeminent advocate of an accommodationist approach toward the relationship between government and religion.<sup>52</sup>

First, Judge McConnell has been a persistent and articulate critic of the Supreme Court's decision in *Employment Division v. Smith*,<sup>53</sup> which eliminated the requirement that the government establish a compelling public interest to justify application of laws in a manner that burdens a religious practice. While the *Smith* Court ruled that the Free Exercise Clause protects only "the right to believe and profess whatever religious doctrine one desires,"<sup>54</sup> McConnell contends that a reading of "free exercise" to prevent the government from enacting laws that make a religious practice illegal is the "more obvious and literal meaning" of the constitutional phrase.<sup>55</sup> He also has argued that the more substantial historical evidence shows that the Founders intended by the Free Exercise Clause to

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<sup>51</sup> Recently, leading scholars—most prominently John Garvey and Michael Paulsen—have argued that the Religion Clauses of the First Amendment should be understood as intended or designed not merely to allow freedom of choice generally but rather to protect religion specifically as an important and valuable activity for society. JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 42–57 (1996); Michael Stokes Paulsen, *God is Great, Garvey is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1600–10 (1997) (book review). One of the authors of this Article has praised what he regards as this insight that "[f]reedoms exist not merely for the neutral purpose of promoting individual autonomy in its most isolated sense but rather to protect certain higher values or goods that we as a society have selected as especially worthy," most especially including "the positive good of religious faith and practice." Gregory C. Sisk, *Stating the Obvious: Protecting Religion for Religion's Sake*, 47 DRAKE L. REV. 45, 45 (1998). However, one need not adopt this rather forthrightly "theological" understanding of the Religion Clauses as a philosophical matter to be an adherent to the Pro-Religion Model as formulated here.

<sup>52</sup> See Letter from Akhil Reed Amar and Vikram David Amar, to Senator Patrick Leahy, *We Like Mike: An Open Letter to Senator Patrick Leahy in Support of Judicial Nominee Michael McConnell*, (Feb. 8, 2002), at <http://writ.news.findlaw.com/amar/20020208.html> (last visited Mar. 12, 2004) (describing McConnell as "perhaps America's pre-eminent scholar of religious liberty"); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 48 n.47 (2002) (describing various scholars, including McConnell, as among the "Religionist" theorists on the Religion Clauses).

<sup>53</sup> 494 U.S. 872 (1990).

<sup>54</sup> *Id.* at 877.

<sup>55</sup> Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1115–16 (1990) [hereinafter McConnell, *Free Exercise Revisionism*]; see also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1489 (1990) [hereinafter McConnell, *Origins and Historical Understanding*] (noting that the word "exercise" as defined in dictionaries at the time of the framing of the Free Exercise Clause "strongly connoted action").

preserve the ability of citizens to fulfill obligations as members of civil society without surrendering their religious convictions.<sup>56</sup> In McConnell's view, the Free Exercise Clause reflects the "theological proposition" that "civil law must be subordinate to conscience":

To deny that the government has an obligation to defer, where possible, to the dictates of religious conscience is to deny that there could be anything like "God" that could have a superior claim on the allegiance of the citizens—to assert that government is, in principle, the ultimate authority. Those are propositions that few Americans, today or in 1789, could accept.<sup>57</sup>

Second, McConnell submits that the Establishment Clause should be understood to permit legitimate accommodation, that is, "government laws or policies that have the purpose and effect of removing a burden on, or facilitating the exercise of, a person's or institution's religion."<sup>58</sup> Treating religion neutrally in terms of the programs of the welfare state also is permissible, "even if the effect is to increase the number of religious choices,"<sup>59</sup> provided that governmental aid or accommodations are "not . . . structured to influence or distort religious choice."<sup>60</sup> McConnell writes:

The First Amendment was not intended to inhibit (or encourage) the religious enthusiasm of the American people, but to make religious exercise free from official orthodoxy. When the government is neutral toward religion and private persons are responsible for religious expression and activity, the Establishment Clause is not implicated—even when religious activity takes place in public settings or receives public benefits.<sup>61</sup>

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<sup>56</sup>Michael W. McConnell, *Freedom From Persecution or Protection of the Rights of Conscience? A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 819 (1998); see also McConnell, *Origins and Historical Understanding*, *supra* note 55, at 1511–13.

<sup>57</sup>McConnell, *Free Exercise Revisionism*, *supra* note 55, at 1152.

<sup>58</sup>Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992) [hereinafter McConnell, *Accommodation Update*]. McConnell stresses that the conception of accommodation that he defends "does not include government action that acknowledges or expresses the prevailing religious sentiments of the community, such as the display of a religious symbol on public property or the delivery of a prayer at public ceremonial events." *Id.* at 687. A significant proportion of the Establishment Clause cases in this study involved religious symbols located on public property or religious icons incorporated in place names or official logos.

<sup>59</sup>Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 175 (1992).

<sup>60</sup>Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 940 (1986) [hereinafter McConnell, *Coercion*].

<sup>61</sup>McConnell, *State Action*, *supra* note 22, at 718.



Thus, in McConnell's view, the Establishment Clause proscribes "government action that has the purpose and effect of coercing or altering religious belief or action."<sup>62</sup> But if a governmental accommodation facilitates the exercise of beliefs and practices freely adopted, such as by removing legal obstacles, does not force others to participate in religious observance, and does not favor one form of religious belief above another, then it encounters no proper constitutional objection.<sup>63</sup> In terms of such accommodation, "government is in a better position than the courts to evaluate the strength of its own interest in governing without religious exception" and "there is no reason for a court to second-guess that conclusion, unless the constitutional rights of other persons are adversely affected."<sup>64</sup>

In addition to his scholarly work on the subject, McConnell prior to ascending to the federal appellate bench successfully represented the parents of children attending religiously affiliated schools in the recent landmark *Mitchell v. Helms* case, in which the Court moved closer to a "neutrality" standard for the Establishment Clause and approved a governmental program in which educational materials and equipment were loaned to public and private, including religious, schools.<sup>65</sup>

In sum, McConnell's accommodationist position holds that constitutionally-compelled accommodations under the Free Exercise Clause "are sometimes required" and legislative or discretionary accommodations that do not induce or coerce religious practices "are always permitted" and should not be invalidated under the Establishment Clause.<sup>66</sup> McConnell's approach has been described by one critic as the "Weak Establishment Clause, Strong Free Exercise Clause" position.<sup>67</sup> In addition, consistent with the broader definition of religious liberty cases used in this study,<sup>68</sup> McConnell has been a successful advocate before the

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<sup>62</sup> McConnell, *Coercion*, *supra* note 60, at 940.

<sup>63</sup> Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 34-41 (1986).

<sup>64</sup> *Id.* at 31.

<sup>65</sup> 530 U.S. 793 (2000)

<sup>66</sup> McConnell, *Accommodation Update*, *supra* note 58, at 687-88. Carl Esbeck similarly endorses neutrality as the means to "maximize[] religious liberty," saying that "whether pondering the constitutionality of exemptions from regulatory burdens or of equal treatment as to benefit programs, in both situations the integrating principle is neutralizing the impact of governmental action on personal religious choices." Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 26 (1997).

<sup>67</sup> Ira C. Lupu, *The Trouble With Accommodation*, 60 GEO. WASH. L. REV. 743, 780 (1992) [hereinafter *Trouble With Accommodation*] (saying that the "Weak Establishment Clause, Strong Free Exercise Clause" position is "McConnell-land").

<sup>68</sup> See *infra* Part III.A.1.

Supreme Court on behalf of those seeking protection under the Free Speech Clause for expression that has religious content.<sup>69</sup>

## *2. Defining Pro-Religion Model as a Dependent Variable*

For purposes of translating the Pro-Religion/Accommodation Model into a dependent variable, decisions upholding free exercise or related accommodation claims (thus affirming the vitality of the religious exercise or expression and elevating it above non-vital governmental controls) and decisions rejecting Establishment Clause claims (thus approving governmental acknowledgment or support, at least on a neutral basis, for religious sentiments or institutions) are treated as positive and the opposite as negative.

By labeling this approach a “Pro-Religion” Model, we do not intend to suggest that an individual jurist or scholar who resists giving preferential treatment to religious practice under the Free Exercise Clause, or who insists upon a strict “Separation of Church and State” under the Establishment Clause, is hostile to religious faith or is an “anti-religious bigot.” Rather, we suggest that a person who takes the position of upholding the priority of religious practice in the absence of a compelling governmental interest *and* who generally approves of the open participation of religious individuals in community affairs, as well as the accommodation of religious institutions with government, is fairly characterized as pro-religion in public life.

In sum, the “Pro-Religion” dependent variable measures a particular robust view about the propriety of religion in public life, without insisting that opponents of public accommodation of religion harbor antipathy toward faith or religious believers outside of this peculiar legal context. However, the diametrically opposed position—resisting governmental accommodation of religion either as compelled by the Free Exercise Clause or as permitted under the Establishment Clause—could properly be denoted as a strict separationist or secularist perspective (which is modeled below).<sup>70</sup>

As explained in our description of the two sets of decisions below,<sup>71</sup> we conceived of the Free Exercise/Accommodation decision set as including positive claims for governmental accommodation and the Establishment decision set as including negative claims to constrain government action. For purposes of ensuring that the “PRO-REL” model dependent variable points in the right

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<sup>69</sup> *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (McConnell was counsel for the student journalists in this case in which the Court held that a public university’s denial of funding to student journal which had a religious editorial viewpoint constituted impermissible viewpoint discrimination and a denial of the students’ right of free speech).

<sup>70</sup> See *infra* Part II.D.

<sup>71</sup> See *infra* Part III.B.

direction, a decision upholding a free exercise-related claim would be coded as “1”; a decision rejecting such a claim would be coded as “0”. Thus, for decisions originally included in the Free Exercise/Accommodation set, the coding for the PRO-REL dependent variable directly corresponds to the coding of the basic free exercise outcome dependent variable (FE-OUTCM).<sup>72</sup> By contrast, a decision upholding a government action against an Establishment Clause challenge was coded as “1”, while a decision accepting the Establishment Clause claim and enjoining government action was coded as “0”. Thus, for decisions originally included in the Establishment set, rulings are coded the opposite of the coding of the establishment claim outcome dependent variable (EC-OUTCM).<sup>73</sup>

### 3. Summary of Empirical Analysis of Pro-Religion Model

While further explanation of the overall results is provided along with a detailed description of the various judge-specific independent variables in Part V of this Article, a summary of the pertinent findings is appropriate here:

The results of a regression analysis of the Pro-Religion Model can be simply and succinctly summarized: there were no consistently significant and positive findings.<sup>74</sup> In dramatic contrast with the various other models examined in this study,<sup>75</sup> not a single variable rose to the level of significance. The variable for Catholic judges came closest to statistical significance, rising to the 93% probability level. While this falls just below the standard significance level of 95% and thus makes us wary of pronouncing this result as a “finding,” the variable does point in the anticipated positive direction for this model—that is, being Catholic made a judge more likely to be “Pro-Religion” when interpreting the Religion Clauses. Together with the near-significant level, the coincidence of this near-finding with the hypothesis suggests that further study of this religious affiliation is merited.<sup>76</sup>

In sum, with the near exception of Catholic judges, our study uncovered no significant patterns among those judges whose approach to religious freedom is most generous toward claimants seeking accommodation and toward governments acknowledging the role of religious communities in public life.

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<sup>72</sup> See *infra* Part IV.A.1.

<sup>73</sup> See *infra* Part IV.B.1.

<sup>74</sup> See *infra* Tbl. 1.

<sup>75</sup> Of course, the Pro-Secularist Model described at *infra* Part II.D likewise produced no significant findings, as the Pro-Secularist and Pro-Religion Models are the antithesis of each other.

<sup>76</sup> Further analysis of Catholic affiliation for judges as a variable is discussed at *infra* Part V.A.1.

Table 1 reports the regression analysis for the Pro-Religion Model. The variables are further explained in Part V of this Article.

Table 1: Regression Analysis for the Pro-Religion Model  
[PRO-REL=1]

<i>Judge Religion:</i>	
Catholic	.27 (.15)
Baptist	.38 (.24)
Other Christian	.24 (.21)
Jewish	.28 (.19)
Other	.03 (.34)
None	-.20 (.27)
<i>Judge Sex and Race:</i>	
Sex	-.02 (.23)
African-American	.03 (.26)
Asian- Latino	-.09 (.39)
<i>Judge Ideology or Attitude:</i>	
Party	.07 (.13)
ABA-Above Qualified	.00 (.13)
ABA-Below Qualified	-.09 (.21)
Seniority	.00 (.00)
<i>Judge Education:</i>	
College Prestige	.00 (.01)
Elite Law School	.14 (.13)
<i>Judge Employ. Bkgd:</i>	
Military	-.21 (.13)
Government	.13 (.12)
State or Local Judge	-.02 (.13)
<i>Community Demographics:</i>	
Catholic-%	-.00 (.01)
Jewish-%	.01 (.02)
Adherence Rate	.01 (.01)
Religious Homogeneity	-.01 (.01)
(constant)	-.93 (.60)
% predicted	60.3
pseudo R <sup>2</sup>	.01
N	1484

\* p < .05; \*\* p < .01.

## B. "Anti-Political" Model (ANTI-POL)

### 1. Theoretical Basis for Anti-Political Model

We appreciate that many "split their votes" so to speak on the Free Exercise Clause and Establishment Clause cases for the most principled of reasons. They advocate a vigorous judicial protection of the free exercise of religious practice, while simultaneously seeking to erect a high wall of separation of religion from political action, based upon a consistent theory of religious freedom. For purposes of this study, we have called this the "Anti-Political" Model, for it is an approach that views the judiciary as the better-suited institution to protect fundamental religious freedoms (through judicial enforcement of religious exemptions under the Free Exercise Clause) and also opposes the entanglement of the political branches with religion and religious institutions through enactment of legislatively-enacted favors or administrative accommodations (thus envisioning a stronger limitation on such political action through application of the Establishment Clause). As Ira Lupu and Robert Tuttle view it, "[t]he Religion Clauses should be read to limit the state's ability—either through support or prohibition—to assert jurisdiction over the transcendent and extra-temporal commitments of its citizens."<sup>77</sup>

For example, constitutional scholar Ira Lupu locates himself on the constitutional map with a "Strong Establishment Clause, Strong Free Exercise Clause" position.<sup>78</sup> Lupu argues that the Supreme Court has erred in withdrawing vigorous constitutional protection for the free exercise of religion, thus leaving the relationship between government and religion to adjustment in the political arena.

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<sup>77</sup> Lupu & Tuttle, *supra* note 52, at 40.

<sup>78</sup> Lupu, *Trouble With Accommodation*, *supra* note 67, at 780. In more recent scholarship, Lupu and Robert Tuttle have argued that the Religion Clauses should be reconsidered as having a "primary focus" on institutions, both governmental and religious, rather than "on the rights of individual believers." Ira C. Lupu & Robert Tuttle, *Sites of Redemption: A Wide Angle Look at Government Vouchers and Sectarian Service Providers*, 18 J.L. & POL. 539, 554 (2002). So understood, Lupu argues that what he calls a "Neutralist" approach, which corresponds to the Judicial-Restraint Model in our study, is "a more constructive starting point" because it "captures the arc of recent jurisprudence of the Religion Clauses, as well as deeper constitutional logic." *Id.* at 549. However, and importantly, Lupu argues that "three core Separationist principles, none of which can be redescribed in Neutralist terms" must be recognized: (1) that "government may not engage in or promote religious worship," (2) that when providing aid for secular purposes to religious institutions, "government must prohibit the diversion of such aid to religious purposes," and (3) that government may not intervene in religious disputes. *Id.* at 550. Together with the Separationist requirement that governmental acts must have a secular purpose, these principles constrain the government as an institution and regulate the government's interactions with religious institutions. *Id.* at 551.

Although Lupu's interpretation of the Free Exercise Clause differs in some respects from that of McConnell,<sup>79</sup> he agrees that the Supreme Court's decision in *Employment Division v. Smith* is "substantively wrong and institutionally irresponsible."<sup>80</sup> Lupu believes that the Free Exercise Clause does "protect[] a limited class of claims for religious exemption from laws of general applicability."<sup>81</sup> When an individual claimant wishes to "refrain from actions which the claimant sincerely believes on religious grounds will be deeply wrong to commit and claims to engage in actions which the claimant sincerely believes on religious grounds will be deeply wrong to omit," then Lupu would privilege the claim of conscience "unless the state can successfully assert that exempting the behavior will cause actual and substantial harm to significant state interests."<sup>82</sup> Likewise, looking at religious entities, Lupu believes that "[g]uarantees of religious liberty . . . seem to empower religious institutions, creating immunities against state regulation that other entities may not share."<sup>83</sup> Indicating his distinct preference for the judiciary as the institution best situated to resolve religion-based disputes, Lupu contends that the courts have a "federal constitutional obligation to weigh state interests against the impact upon religion worked by state policies."<sup>84</sup>

When turning from mandatory accommodations of religion "required by force of the Free Exercise Clause" to permissive accommodations through the "exercise of political discretion [to] benefit religion," Lupu finds that serious Establishment Clause concerns arise.<sup>85</sup> In contrast with McConnell, Lupu contends that "the Establishment Clause is impoverished and distorted if it is limited to government action that coerces conduct."<sup>86</sup> Instead, the clause should

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<sup>79</sup> Lupu, *Trouble With Accommodation*, *supra* note 67, at 775 (explaining that he would place greater attention on determining the meaning and significance of the religious practice and the sincerity of the individual claimant); Lupu & Tuttle, *supra* note 52, at 83 (explaining that "subtle lines [must be drawn] between those occasional cases and contexts in which there is persuasive warrant for special treatment of religious institutions and those in which no such warrant exists").

<sup>80</sup> Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 260 (1993).

<sup>81</sup> Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 562 (1991) [hereinafter *Reconstructing Establishment Clause*].

<sup>82</sup> *Id.* at 562-63; *see also* Lupu, *Trouble With Accommodation*, *supra* note 67, at 774 (stating that "[i]ndividual claims tend to be most compelling, because they are more likely to be true claims of conscience, are most verifiable, and tend to be least threatening to other social goals"); Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

<sup>83</sup> Lupu & Tuttle, *supra* note 52, at 38-39.

<sup>84</sup> Lupu, *Trouble with Accommodation*, *supra* note 67, at 759.

<sup>85</sup> *Id.* at 751.

<sup>86</sup> Lupu, *Reconstructing Establishment Clause*, *supra* note 81, at 578.

be understood to impose some version of “constitutional equality with real constraining force over political decisions.”<sup>87</sup>

Accordingly, in Lupu’s view, “[t]rue permissive accommodations—that is, religion-specific action not required by the Constitution—simply should be forbidden.”<sup>88</sup> He is troubled by the concept of religion as a political interest,<sup>89</sup> in which political forces would be unleashed in the service of religion.<sup>90</sup> In his view, the Religion Clauses were intended to “decouple[] religious and civil institutions,” depriving the government of “jurisdiction over religious matters, thus ensuring the autonomy of religious institutions and simultaneously depriving these same institutions of any incentive to capture the organs of government to further their religious missions.”<sup>91</sup> Thus, the problem he sees with legislative exemption is that of religious favoritism,<sup>92</sup> because “permissive accommodation policies almost always are religion-specific. Such policies always prefer religion to their non-religious counterparts, and sometimes prefer named sects to others.”<sup>93</sup> Such a regime, he fears, “is highly likely to privilege mainstream, well-known religions, or locally dominant ones, and thereby to aggravate conditions of religious inequality,”<sup>94</sup> while Lupu again sees religious equality as the animating purpose of the Establishment Clause.

Against this politicization of religious liberty, Lupu poses the judiciary as the preferred institution to reconcile the demands of religious equality with the command of religious freedom.<sup>95</sup> In contrast with the realm of politics, the courts are obliged to decide the merits of cases, to prepare written opinions that ensure intellectual honesty and accountability to a coherent formula, to decide based upon principle rather than political trade-offs, to tailor decisions to the particular needs of the case, and to maintain national uniformity.<sup>96</sup>

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<sup>87</sup> *Id.* at 581.

<sup>88</sup> Lupu, *Trouble With Accommodation*, *supra* note 67, at 779. However, Lupu defines impermissible accommodation as those legislative or administrative acts that provide special or exceptional treatment to religious sects or adherents; he excludes “general programs of government benefits, designed for purposes other than aiding religion, for which religious individuals or institutions may (along with others) be eligible.” For example, religious schools or charities may be included in general programs “when such inclusion is based on something other than the institution’s religious character.” Lupu, *Reconstructing Establishment Clause*, *supra* note 81, at 559–60; see also Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 375 (1999).

<sup>89</sup> Lupu, *Reconstructing Establishment Clause*, *supra* note 81, at 597.

<sup>90</sup> Lupu, *Trouble With Accommodation*, *supra* note 67, at 754.

<sup>91</sup> Lupu & Tuttle, *supra* note 52, at 38.

<sup>92</sup> Lupu, *Trouble With Accommodation*, *supra* note 67, at 776.

<sup>93</sup> *Id.* at 768.

<sup>94</sup> Lupu, *Reconstructing Establishment Clause*, *supra* note 81, at 586.

<sup>95</sup> *Id.* at 600.

<sup>96</sup> *Id.* at 601–06.

Lupu sums up his position in this way:

If we are to have a regime of equal religious liberty, judges must in the name of the Constitution reassert control over distinctive treatment of religion. When the Constitution requires such treatment, courts should fearlessly order it; but whatever is not required is presumptively proscribed, and courts should with equal courage invalidate forbidden forays by the political branches into the field of religious accommodation.<sup>97</sup>

## *2. Defining Anti-Political Model as a Dependent Variable*

Judges who take an approach similar to Lupu's with regard to the Religion Clauses (and reflect that approach in decisions included in our database) would be coded one way when participating in Free Exercise/Pro-Accommodation cases and another way when coded in Establishment/Anti-Accommodation cases, thereby preserving their "split" decisions. For purposes of the "ANTI-POL" model, a decision upholding a free exercise-related claim is coded as "1"; a decision rejecting such a claim would be coded as "0". Likewise, a decision upholding an establishment of religion challenge to government action is coded as "1", while a decision rejecting the Establishment Clause claim and upholding governmental action related to religion is coded as "0".

## *3. Summary of Empirical Analysis of Anti-Political Model*

While further explanation of the overall results is provided along with a detailed description of the various judge-specific independent variables in Part V of this Article, a summary of the pertinent findings is appropriate here:

In contrast with the absence of sufficiently significant findings for the Pro-Religion and Pro-Secularist Models, there are distinct and generally anticipated patterns among the judge-specific background variables for the Anti-Political model. To be specific, Jewish and Other Christian affiliation by judges, communities with high percentages of Jews and with high adherence generally to organized religion, and greater seniority of judges are all significantly and positively associated with this theoretical approach.<sup>98</sup>

Jewish judges were significantly more likely (at the 99% probability level) to adopt the Anti-Political model of the Religion Clauses of the Constitution.<sup>99</sup> This association is further confirmed by the significant correlation of Jewish judges both with a favorable outcome in claims under the Free Exercise/Accommodation model of this study and with a favorable outcome in claims under the

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<sup>97</sup> *Id.* at 611–12.

<sup>98</sup> *See infra* Tbl. 2.

<sup>99</sup> *Id.*



Establishment model, both of which are reported later.<sup>100</sup> Given that Jews have been a distinct minority in American religious life and have suffered societal discrimination in the past, judges from the Jewish religious tradition would be expected to respond generously to claims by religious dissenters and religious minorities for exemption from governmental regulations or actions that impinge upon religious beliefs or practices.<sup>101</sup> Likewise, Jews understandably would be skeptical of perceived governmental endorsements of majoritarian religious views, which invariably would be Christian in orientation.<sup>102</sup> Although this Strong-Free-Exercise/Strong-Establishment stance also comports with the traditional liberal approach,<sup>103</sup> it should be emphasized, particularly for readers not familiar with statistical studies, that the regression analysis examined each religious affiliation variable in isolation while controlling for every other independent variable, including the ideology variables included in the model. Accordingly, our study suggests that something about the Jewish experience or perspective moves a Jewish judge toward this particular approach to religious freedom issues, independent of whether that judge was appointed by a Republican or Democratic President or whether the judge falls on the conservative or liberal side of the ideological scale.

Under this Anti-Political model, Jewish judges were joined in significant correlation (also at the 99% probability level) by judges affiliated with non-mainstream Christian denominations, that is, Christian fellowships other than the Catholic, Mainline Protestant, and Baptist traditions.<sup>104</sup> As with Jewish judges, these “Other Christian” judges were significantly more likely to uphold claims in the Free Exercise/Accommodation model of our study.<sup>105</sup> Given that this category of religious affiliation is defined more by what is not—that is, these judges did not specifically identify themselves with the Catholic-Protestant mainstream—the best explanation may follow from that same observation. These judges apparently belong to less conventional or non-denominational Christian fellowships.<sup>106</sup> If this understanding is correct, it is reasonable to expect that such

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<sup>100</sup> See discussion *infra* Parts IV.A.1, IV.B.1, and V.A.1; see *infra* Tbls. 5 and 6.

<sup>101</sup> See Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 235–38, 246, 251–59 (2003) (describing American Jews as a “prototypical religious outgroup,” surveying the history of Jews in America as a religious minority, and discussing free exercise claims by Jews).

<sup>102</sup> *Id.* at 238 (describing American Jews, and the American Jewish Congress in particular, as “strongly advocat[ing] for the strict separation of church and state”).

<sup>103</sup> That this Anti-Political Model has been the one exemplified by most liberal members of the United States Supreme Court is further addressed in *infra* Part II.D.

<sup>104</sup> For further discussion of the coding of judges on religious background, see *infra* Part V.A.1. See *infra* Tbl. 2.

<sup>105</sup> See *infra* Parts IV.A.1, V.A.1.

<sup>106</sup> As discussed further with respect to the coding of religious background in Part V.A.1, the largest single segment of judges placed into the “Other Christian” category were those

judges would be more skeptical of governmental determinations that implicate religion precisely because those political decisions are likely to reflect the priorities and value choices of the dominant majority.

In addition, the seniority or time on the bench of the deciding judge also was significant (at the 95% probability level).<sup>107</sup> In other words, the longer that a judge had served on the federal bench, the more likely that the judge would fall into the Anti-Political model framework. Based upon this finding, it may be that judges over time develop a greater confidence in the judicial role and a greater comfort in the constitutionally-protected independence of the federal judiciary afforded by life-long tenure so as to more readily set aside the constitutionally dubious decisions of government. Stated alternatively, for observers who normatively perceive this outcome as an unhappy one, federal judges with the passage of time may become more active and less restrained against intervening in the affairs of the political branches of federal, state, or local government (at least when it comes to interaction with religion).

For this Anti-Political model, the religious demography of the community in which the deciding judge maintained chambers proved to be part of the pattern as well. Two religious demographic measures<sup>108</sup> proved significant and positive.<sup>109</sup> First, significantly (at the 99% probability level) and consistently, a higher rate of general adherence to religion in a community was associated with the Anti-Political Model. In sum, the greater the religiosity of a community, the more likely that a judge living in that community will adhere to this particular theoretical approach. We would expect that a community with a higher level of religious affiliation and thus in which more citizens acknowledge a higher calling would be associated with a greater receptivity to the religious believer who seeks accommodation of religious beliefs or practices. Less obvious is the reason why a less-secular community would be correlated with a theoretical approach that insists upon a strict separation of religion from official public life. However, that such is the case is further confirmed by our findings that a higher adherence rate also was positively associated both with successful outcomes on Free Exercise/Accommodation claims and on Establishment claims.<sup>110</sup>

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identifying themselves as "Protestant" without an accompanying denominational affiliation. Accordingly, some of these judges may in fact be members of denominations that fall within the Mainline Protestant category. However, we suggest that judges who declined denominational identification are less likely to belong to traditional and well-identified denominations and more likely to belong to the non-denominational churches that both fall outside of the mainstream and that have increased in membership in recent decades.

<sup>107</sup> See *infra* Tbl. 2.

<sup>108</sup> For further discussion of the coding of religious demographics in this study, see *infra* Part V.A.2.

<sup>109</sup> See *infra* Tbl. 2.

<sup>110</sup> See *infra* Parts IV.A.1, IV.B.1, and V.A.2.

Second, a higher Jewish presence in a community was also significantly correlated (at the 95% probability level) with this model. Given the close and strong association of Jewish judges with the Anti-Political Model, for the reasons explained above, the greater visibility of Jews within a community due to a larger presence might be expected to influence the general perspective of the larger community toward matters of church and state. Again, the reader should understand that this demographic variable was examined through regression analysis independent of whether the particular judge was Jewish. Thus, it appears that the religious environment or culture of a community may have an influence even upon those judges in that community who do not share a particular faith.

Finally, our variable for attendance by a judge at an elite law school<sup>111</sup> was tantalizingly close to statistical significance, falling at the 94% probability level. Thus, while we are not yet ready to declare this as a finding, there is some evidence justifying further study that judges attending an elite law school were more likely to adopt the Anti-Political Model. Or to make this point from the perspective of its theoretical antithesis, graduates of elite law schools were less likely to exercise judicial restraint in interpretation of the Religion Clauses of the Constitution.

Table 2 reports the regression analysis for the Anti-Political model. The variables are further explained in Part V of this Article.

Table 2: Regression Analysis for the Anti-Political Model  
[ANTI-POL=1]

<i>Judge Religion:</i>	
Catholic	.21 (.16)
Baptist	.35 (.25)
Other Christian	.60** (.21)
Jewish	.73** (.20)
Other	.32 (.35)
None	.39 (.27)
<i>Judge Sex and Race:</i>	
Sex	-.18 (.24)
African-American	.03 (.26)
Asian- Latino	.68 (.38)
<i>Judge Ideology or Attitude:</i>	
Party	-.15 (.14)
ABA-Above Qualified	.12 (.14)
ABA- Below Qualified	.16 (.22)
Seniority	.00* (.00)
<i>Judge Education:</i>	
College Prestige	-.01 (.01)

<sup>111</sup> The definition of "elite" for law schools and how this variable was coded is set out at *infra* Part V.A.4.

Elite Law School	.27 (.14)
<i>Judge Employ. Bkgd:</i>	
Military	-.14 (.13)
Government	.04 (.12)
State or Local Judge	-.18 (.13)
<i>Community Demographics:</i>	
Catholic-%	-.00 (.01)
Jewish-%	.03* (.02)
Adherence Rate	.03** (.01)
Religious Homogeneity	-.01 (.01)
(constant)	-1.23* (.63)
% predicted	64.5
pseudo R <sup>2</sup>	.04
N	1484

\* p < .05; \*\* p < .01.

### C. "Judicial-Restraint" Model (JUD-REST)

#### 1. Theoretical Basis for Judicial-Restraint Model

As a third integrated theory of the Religion Clauses, advocates of judicial restraint tend to disfavor judicial intervention against the decisions of the political branches of government on either Free Exercise Clause or Establishment Clause grounds. Such a jurist or scholar would thus oppose an active application of the Free Exercise Clause to formulate judicially-created and constitutionally-mandated religious exemptions to governmental regulation, and would also narrowly construe the Establishment Clause so as to leave ample political room for government to grant discretionary accommodations to religious institutions through statutory and regulations exceptions. Ira Lupu describes this position as one of "Weak Establishment Clause, Weak Free Exercise Clause" and suggested a decade ago that the "Supreme Court is steamrolling in this direction."<sup>112</sup>

This position of course describes the jurisprudence of Justice Antonin Scalia, who authored the Supreme Court's majority opinion in *Employment Division v. Smith*.<sup>113</sup> In that decision, the Court ruled that government need not establish any compelling interest to justify application of a neutral law of general application in a manner that burdens a religious practice.<sup>114</sup> Thus, under Justice Scalia's analysis, a general law does not implicate the Free Exercise Clause and is not subject to any constitutional scrutiny.

<sup>112</sup> Lupu, *Trouble With Accommodation*, *supra* note 67, at 780.

<sup>113</sup> 494 U.S. 872, 873 (1990).

<sup>114</sup> *Id.* at 882-89.

In his concurring opinion in *City of Boerne v. Flores*,<sup>115</sup> in which the Court invalidated the Religious Freedom Restoration Act, Justice Scalia further contended that the historical evidence also undercuts a broad reading of the Free Exercise Clause.<sup>116</sup> He interpreted colonial and revolutionary era religious freedom charters to prohibit only discriminatory laws targeted at religion; he construed charter caveats or provisos limiting the scope of religious liberty to peaceable conduct as broadly mandating obedience to general civil laws; and he argued that exemptions from civil laws on religious grounds during the colonial and founding period were understood to be a matter of legislative grace.<sup>117</sup>

Justice Scalia concludes that the ordinary political process, not judicial mandate, should be the means for determining whether and how to accommodate religion by creating exceptions to legal obligations.<sup>118</sup> In response to concerns about entrusting religious liberty to the political realm, Justice Scalia remarked:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.<sup>119</sup>

Having deferred the question of religious accommodation to the political branches of government, Justice Scalia is quite willing to leave ample room for political decisionmakers to afford such accommodation. He has joined the majority of the Court in recent decisions that have opened the door further to public aid to public schools and institutions, including those that are religiously-affiliated.<sup>120</sup> Justice Scalia has cited the pervasively religious climate of the founding period in the context of interpreting the Establishment Clause, finding the historical practice justifies greater accommodation of religion by government.

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<sup>115</sup> 521 U.S. 507 (1997).

<sup>116</sup> See *id.* at 537–44 (Scalia, J., concurring in part).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 544; *Smith*, 494 U.S. at 890.

<sup>119</sup> *Smith*, 494 U.S. at 890.

<sup>120</sup> *Mitchell v. Helms*, 530 U.S. 793 (2000) (rejecting Establishment Clause challenge and approving a governmental program in which educational materials and equipment were loaned to public and private, including religious, schools); *Agostini v. Felton*, 521 U.S. 203 (1997) (overruling earlier decisions and holding that the Establishment Clause did not proscribe a public program that used public employees to teach remedial classes at private schools, including religious schools); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (rejecting Establishment Clause challenge to a federal grant program that provided funding to both secular and religious charitable organizations for services related to adolescent sexuality and pregnancy).

In dissenting in *Lee v. Weisman*<sup>121</sup> from a decision holding that a school could not appoint a clergyman to deliver a non-sectarian prayer at a high school graduation, Justice Scalia appealed to the religious devotion of the American people and their leaders from the founding era to the present day:

Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers it is *not* that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the "protection of divine Providence," as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington's first Thanksgiving Proclamation put it, the "Great Lord and Ruler of Nations."<sup>122</sup>

In sum, Justice Scalia's position, with respect to both the Free Exercise Clause and the Establishment Clause "is one of relatively unfettered political choice and minimal judicial involvement."<sup>123</sup>

### *2. Defining Judicial-Restraint Model as a Dependent Variable*

For purposes of ensuring that the combined "JUD-REST" dependent variable points in the right direction, a decision rejecting a free exercise-related claim is coded as "1;" a decision upholding such a claim would be coded as "0." Likewise, a decision rejecting an Establishment Clause challenge to governmental interaction with religion is coded as "1," while a decision accepting the Establishment Clause claim and enjoining governmental action is "0." Thus, both for decisions originally included in the Free Exercise decision set and for those originally included in the Establishment decision set, rulings are coded the opposite of the coding of the respective outcome dependent variable (FE-OUTCM and EC-OUTCM).<sup>124</sup>

### *3. Summary of Empirical Analysis of Judicial-Restraint Model*

While further explanation of the overall results is provided along with a detailed description of the various judge-specific independent variables in Part V of this Article, a summary of the pertinent findings is appropriate here.

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<sup>121</sup> 505 U.S. 577 (1992).

<sup>122</sup> *Id.* at 645 (Scalia, J., dissenting).

<sup>123</sup> Lupu, *Trouble With Accommodation*, *supra* note 67, at 780.

<sup>124</sup> See *infra* Part IV.A.1, IV.B.1.

The results for the Judicial-Restraint Model need not be set out at great length, given that they necessarily are the mirror-opposite of the findings for its theoretical antithesis, the Anti-Political model. Thus, to state those results in the negative for this model, judges with a Jewish and non-mainstream Christian affiliation were significantly less likely to exercise judicial restraint within the meaning of this model, as were judges with greater seniority on the federal bench and who hailed from communities with higher percentages of Jews and a greater overall adherence to religious traditions.<sup>125</sup>

Table 3 reports the regression analysis for the Judicial-Restraint Model. The variables are further explained in Part V of this Article.

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<sup>125</sup> See *infra* Tbl. 3.

Table 3: Regression Analysis for the Judicial-Restraint Model  
[JUD-REST=1]

<i>Judge Religion:</i>	
Catholic	-.21 (.16)
Baptist	-.35 (.25)
Other Christian	-.60** (.21)
Jewish	-.73** (.20)
Other	-.32 (.35)
None	-.39 (.27)
<i>Judge Sex and Race:</i>	
Sex	.18 (.24)
African-American	-.03 (.26)
Asian/Latino	-.68 (.38)
<i>Judge Ideology or Attitude:</i>	
Party	.15 (.14)
ABA-Above Qualified	-.12 (.14)
ABA- Below Qualified	-.16 (.22)
Seniority	-.00* (.00)
<i>Judge Education:</i>	
College Prestige	.01 (.01)
Elite Law School	-.27 (.14)
<i>Judge Employ. Bkgd:</i>	
Military	.14 (.13)
Government	-.04 (.12)
State or Local Judge	.18 (.13)
<i>Community Demographics:</i>	
Catholic-%	.00 (.01)
Jewish-%	-.03* (.02)
Adherence Rate	-.03** (.01)
Religious Homogeneity	.01 (.01)
(constant)	1.23* (.63)
% predicted	64.5
pseudo R <sup>2</sup>	.04
N	1484

\* p < .05; \*\* p < .01.

#### D. "Pro-Secularist/Strict Separationist" Model (PRO-SEC)

##### 1. Theoretical Basis for Pro-Secularist Model

Finally, we postulate a Pro-Secularist or Strict Separationist model. This is a perspective that is skeptical toward religion in public life, whether in terms of judicially-decreed accommodation for religious exercise or governmental



acceptance of religiously-influenced elements in public law and participation of religious institutions in public programs.

Among the members of the Supreme Court in the modern era, Justice John Paul Stevens most consistently and aggressively has advocated this approach.<sup>126</sup> Justice Stevens firmly resists any public support or aid to religious institutions as violative of the Establishment Clause, while likewise refusing to recognize any constitutionally-based (or, for that matter, statutorily-based) relief from laws of general application that impinge upon the central religious practices of citizens, thus generally rejecting Free Exercise Clause claims.

Justice Stevens has been described by one scholar as the leading exponent of the secularist position, which “would guarantee exclusion of religious elements from public benefits, without protecting religious activity from the consequences of public burdens.”<sup>127</sup> In stark and critical terms, another scholar labels Justice Stevens as “implacably hostile to religion” and offers this outline of the jurist’s views:

Religion always loses on the Establishment Clause side, on a strict separationist protection-of-secular-society-from-religion view. And religion always loses on the Free Exercise side, on a what-a-mess-this-gets-us-into-and-what-makes-religion-so-special-anyway view. Stevens even thinks that the existence of religious motivations for enacting a law should be sufficient reason for invalidating it. [Furthermore,] there is evidence that Stevens simply thinks religion is narrow-minded, suspicious, a troubling way for people to view the world (if not affirmatively stupid and dangerous), and certainly not something to be accommodated.<sup>128</sup>

Some of his own colleagues on the Court have been unusually harsh in their criticism of Justice Stevens’s attitude toward religion, saying, for example, that one of his Establishment Clause opinions “bristles with hostility to all things religious in public life.”<sup>129</sup>

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<sup>126</sup> Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 7 (2000) (identifying Justice Stevens as “[p]erhaps the most prominent advocate” of the position that “‘singling out’ of religion for special protection violates the neutrality commanded of the Religion Clauses by ‘privileging’ religion over nonreligion”); Lupu & Tuttle, *supra* note 78, at 546 n.21 (identifying Justice Stevens as adhering to “Secularism” based upon his voting patterns).

<sup>127</sup> Michael W. McConnell, *The Religion Clauses of the First Amendment: Where Is the Supreme Court Heading?*, 32 CATH. LAW. 187, 197 (1989).

<sup>128</sup> Michael Stokes Paulsen, *Counting Heads on RFRA*, 14 CONST. COMMENT. 7, 17–18 (1997). Absent the suggestion that Justice Stevens harbors personal antipathy to religion, Ira Lupu similarly describes Justice Stevens as “relentlessly secularist,” as “[h]e routinely joins opinions that are receptive to Establishment Clause claims” and “also routinely joins opinions that are hostile to Free Exercise Clause claims.” Lupu & Tuttle, *supra* note 52, at 48 n.48.

<sup>129</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., joined by

Those justices of the Supreme Court who are commonly described as liberal generally have combined a skepticism toward the emergence of religion in official governmental settings, reflected in a determined application of the Establishment Clause, with strong support “for a more generous construction of the Free Exercise Clause” through exemptions for those whose religious convictions prevent compliance with legal mandates.<sup>130</sup> By contrast, Justice Stevens stands alone among the liberal members of the Court in consistently opposing religious influences on governance through the Establishment Clause, while also refusing to approve any Free Exercise Clause-mandated accommodation from strict application of law regardless of the burdens on religious adherents.<sup>131</sup> Indeed, alone among all the Justices, Justice Stevens has aggressively challenged even the enactment by legislatures of permissive exemptions for members of religious communities, regarding any acknowledgment by political bodies of the conflicts faced by religious communities as a violation of the Establishment Clause.<sup>132</sup>

In *Employment Division v. Smith*,<sup>133</sup> the Supreme Court eliminated Free Exercise exemptions, holding that religious adherents could not claim a constitutional privilege from laws of general application. Justice Stevens joined the majority opinion authored by Justice Scalia in holding that a state could properly “include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug,”<sup>134</sup> while Justice Blackmun, joined by Justices Brennan and Marshall, dissented on the ground that the state interest in enforcement of drug laws was not “sufficiently compelling to outweigh respondents’ right to the free exercise of their religion.”<sup>135</sup>

When the Supreme Court invalidated the Religious Freedom Restoration Act (RFRA)—Congress’s ill-fated attempt to restore through statute the compelling-interest test for government burdens on religious practice—Justice Stevens again was aligned with Justice Scalia in not only finding the enactment infringed upon federalism constraints on congressional power but also in resisting any revisitation of the constitutional holding in *Smith* that had rejected Free Exercise

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Scalia, J. and Thomas, J., dissenting).

<sup>130</sup> Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19, 59 (1991).

<sup>131</sup> *Id.* However, it should be noted that Justice Stevens has not hesitated to ensure that religious organizations enjoy the full protections of the Free Speech Clause of the First Amendment. See, e.g., *Watchtower Bible & Tract Soc’y v. Vill. of Stratton*, 536 U.S. 150, 160–69 (2002) (opinion by Justice Stevens, holding that a village ordinance requiring individuals to obtain a permit prior to engaging in door-to-door advocacy and to display the permit upon request violated the free speech rights of religious organizations).

<sup>132</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring).

<sup>133</sup> 494 U.S. 872 (1990).

<sup>134</sup> See *id.* at 874 (describing the issue in the case).

<sup>135</sup> *Id.* at 921 (Blackmun, J., dissenting).

exemptions.<sup>136</sup> Even more significantly, while the majority of the Court held that Congress lacked authority under the Fourteenth Amendment to impose a particular standard of religious exemptions on the states, Justice Stevens went well beyond where any other member of the Court was willing to go in pronouncing any governmental allowance for a religiously-based exemption as an illegitimate establishment of religion:

If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.<sup>137</sup>

Turning then to the Establishment Clause side of religious disputes, Justice Stevens has been a reliable vote against governmental recognition of religion or inclusion of religious institutions in governmental programs. He has spoken in favor of “a strong presumption against the display of religious symbols on public property.”<sup>138</sup> He likewise consistently has closed the door on even voluntary prayer in public school settings. He authored an opinion for the Court that struck down a state statute authorizing a daily period of silence in public school classrooms as lacking a secular purpose because he found the legislature thereby improperly “intended to characterize prayer as a favored practice.”<sup>139</sup> He also wrote an opinion that prohibited a school district from permitting an invocation by an elected student leader before football games on the grounds that the school district thereby effectively “sponsors the particular religious practice of prayer” and “empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages.”<sup>140</sup> And Justice Stevens has adhered to a secularist viewpoint in cases beyond those involving religious symbols or practices in a public setting. While Justice Stevens acknowledges that a law is not vulnerable to Establishment Clause challenge merely because legislators may have been motivated by religious considerations, he nonetheless has suggested that legislation restricting abortion is constitutionally suspect

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<sup>136</sup> *City of Boerne*, 521 U.S. at 537–44 (Scalia, J., joined by Stevens, J., concurring in part).

<sup>137</sup> *Id.* at 536–37 (Stevens, J., concurring).

<sup>138</sup> *County of Allegheny v. A.C.L.U.*, 492 U.S. 573, 650 (1989) (Stevens, J., concurring in part and dissenting in part).

<sup>139</sup> *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985).

<sup>140</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313, 316 (2000).

because the viewpoint that "life begins at conception and that conception occurs at fertilization" reflects a theological position without any secular basis.<sup>141</sup>

The secularist theme that permeates Justice Stevens's constitutional jurisprudence is perhaps best exemplified by his concurring opinion in *Board of Education of Kiryas Joel Village School District v. Grumet*.<sup>142</sup> In that case, the State of New York had created a special school district for the religious enclave of Satmar Hasidim, practitioners of a strict form of Judaism, so that disabled children from that religious community (who otherwise attended private religious schools) could receive special educational assistance in a familiar environment without having to go to a nearby public school district, where these children had encountered harassment and ridicule by other students because of their different appearance and lifestyle.<sup>143</sup> The Court majority invalidated the creation of a special school district that conformed to the lines of the religious enclave as an infringement upon the Establishment Clause because the government's action was not neutral with respect to religion.<sup>144</sup> Justice Stevens wrote separately to offer what one scholar describes as "[a]n even broader and more aggressively secularist rationale"<sup>145</sup> for why the state's attempted accommodation of this religious community could not pass constitutional muster. Justice Stevens said:

[T]he State responded with a solution that affirmatively supports a religious sect's interest in segregating itself and preventing its children from associating with their neighbors. The isolation of these children, while it may protect them from "panic, fear and trauma," also unquestionably increased the likelihood that they would remain within the fold, faithful adherents of their parents' religious faith. By creating a school district that is specifically intended to shield children from contact with others who have "different ways," the State provided official support to cement the attachment of young adherents to a particular faith.<sup>146</sup>

In dissent, Justice Scalia responded pointedly to what he called Justice Stevens's "manifesto of secularism," which Justice Scalia viewed as questioning

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<sup>141</sup> *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 566-67 (1989) (Stevens, J., concurring in part and dissenting in part).

<sup>142</sup> 512 U.S. 687 (1994).

<sup>143</sup> *Id.* at 690-94; see also *id.* at 724 (Kennedy, J., concurring in the judgment); Thomas C. Berg, *Slouching Towards Secularism: A Comment on Kiryas Joel School District v. Grumet*, 44 EMORY L.J. 433, 434 (1995) (characterizing this case as involving an attempt by "the political and cultural majority [to protect] the practices of an unconventional minority without imposing any costs on other citizens" and thus as "an encouraging example of how to respond positively to the challenges of pluralism and multiculturalism").

<sup>144</sup> *Kiryas Joel Vil. Sch. Dist.*, 512 U.S. at 702-08.

<sup>145</sup> Berg, *supra* note 143, at 484.

<sup>146</sup> *Kiryas Joel Vil. Sch. Dist.*, 512 U.S. at 711 (Stevens, J., concurring).

state action to support parents in transmitting their values, including religious values, to their own offspring.<sup>147</sup>

In sum, while it is not necessary for our purposes to render a verdict on whether Justice Stevens is affirmatively antipathetic to religion, he certainly displays a distinctly and forthrightly secularist approach to legal jurisprudence. His approach on these questions well capsulizes the “Pro-Secularist” Model we use in this study.

## *2. Defining Pro-Secularist Model as a Dependent Variable*

For purposes of ensuring that the combined “PRO-SEC” dependent variable points in the right direction, a decision which rejects a free exercise-related claim is coded as “1;” a decision upholding such a claim is coded as “0.” Thus, for decisions included in the Free Exercise decision set, rulings are coded the opposite of the coding of the free exercise claim outcome dependent variable (FE-OUTCM).<sup>148</sup> For decisions included in the Establishment decision set, the coding for the PRO-SEC dependent variable directly corresponds to the coding of the basic establishment outcome dependent variable (EC-OUTCM).<sup>149</sup>

## *3. Summary of Empirical Analysis of Pro-Secularist Model*

While further explanation of the overall results is provided along with a detailed description of the various judge-specific independent variables in Part V of this Article, a summary of the pertinent findings is appropriate here.

The results of a regression analysis of the Pro-Secularist Model reflect (in a mirror-opposite manner) those of the Pro-Religion Model; that is, there is a conspicuous absence of any significant findings—with one exception. In our standard set of variables and two alternatives as reported in the Table below,<sup>150</sup> our study uncovered no patterns among those judges whose approach to religious freedom decisions is defined by an insistence upon secular prerogatives in public policy and exclusion of sectarian perspectives in public life—although Catholic affiliation for judges approached significance in rejection of this model.

The one exception emerged in an alternative regression analysis in which dummy variables for the individual appointing Presidents were substituted as the measure of ideology.<sup>151</sup> Interestingly, judges appointed by Presidents Eisenhower, Kennedy, and Johnson were significantly more likely to be

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<sup>147</sup> *Id.* at 749 (Scalia, J., dissenting).

<sup>148</sup> See *infra* Part IV.A.1.

<sup>149</sup> See *infra* Part IV.B.1.

<sup>150</sup> See *infra* Tbl. 4.

<sup>151</sup> While this regression run is not reported with a table in this Article, the results are available from the authors.

associated with this Pro-Secularist Model.<sup>152</sup> Given the absence of any obvious similarities between the Republican Eisenhower and Democratic Kennedy-Johnson Administrations other than that the latter immediately succeeded the former, and in view of the absence of any significant correlation between judges appointed by other Presidents, Republican or Democratic, with this model, we suggest the most likely explanation is one of historical timing. Judges appointed during the 1950s and through the 1960s would have spent their formative years on the federal bench at a time when “a fairly strict ‘separation of church and state’ became the dominant ideal in Supreme Court decisions and in the culture for explaining the proper relation between religion and the state.”<sup>153</sup> As “this strain of separationism lost ground” in the 1980s and 1990s,<sup>154</sup> judges appointed in more recent decades understandably became less likely to emulate a strongly-defined secularist approach to religious freedom questions.

Table 4 reports the regression analysis for the Pro-Secularist Model. The variables are further explained in Part V of this Article.

Table 4: Regression Analysis for the Pro-Secularist Model  
[PRO-SEC=1]

<i>Judge Religion:</i>	
Catholic	-.27 (.15)
Baptist	-.38 (.24)
Other Christian	-.24 (.21)
Jewish	-.28 (.19)
Other	-.03 (.34)
None	.20 (.27)
<i>Judge Sex and Race:</i>	
Sex	-.02 (.23)
African-American	-.03 (.26)
Asian-Latino	.09 (.39)
<i>Judge Ideology or Attitude:</i>	
Party	-.07 (.13)
ABA-Above Qualified	-.00 (.13)
ABA- Below Qualified	.09 (.21)
Seniority	-.00 (.00)
<i>Judge Education:</i>	
College Prestige	.00 (.01)
Elite Law School	-.14 (.13)

<sup>152</sup> The Eisenhower variable was significant at the 99% probability level, while a combined Kennedy-Johnson variable was significant above the 95% probability level.

<sup>153</sup> Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121, 122 (2001).

<sup>154</sup> *Id.* at 123.

<i>Judge Employ. Bkgd:</i>	
Military	.21 (.13)
Government	-.13 (.12)
State or Local Judge	.02 (.13)
<i>Community Demographics:</i>	
Catholic-%	.00 (.01)
Jewish-%	-.01 (.02)
Adherence Rate	-.01 (.01)
Religious Homogeneity	.01 (.01)
(constant)	.93 (.60)
% predicted	60.3
pseudo R <sup>2</sup>	.01
N	1484

\* p < .05; \*\* p < .01.

### III. COLLECTING THE DATA, ESTABLISHING SETS OF DECISIONS, AND REGRESSION ANALYSIS

In keeping with our prior and ongoing empirical work on the federal courts,<sup>155</sup> our focus in this study is upon judges of the lower federal courts. Although the Supreme Court takes the point on questions of constitutional dimension, empirical studies of that Court are both abundant and ambiguous. For decades social scientists and legal academics have devoted perhaps excessive attention to the high Court, neglecting until recently the other courts that decide the lion's share of cases in our court systems.<sup>156</sup> Moreover, because of the small

<sup>155</sup> Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998); Andrew P. Morriss, Michael Heise & Gregory C. Sisk, *Signaling and Precedent in Federal District Court Opinions* (2004) (unpublished paper).

<sup>156</sup> Encouragingly, the rather fixed focus upon the Supreme Court has been broken in the last decade, with the federal courts of appeals and district courts becoming the subject of increasing attention among political scientists and legal academics doing empirical work on the judiciary. See e.g., DEBORAH J. BARROW, GARY ZUK, & GERARD S. GRYSKI, *THE FEDERAL JUDICIARY AND INSTITUTIONAL CHANGE* (1996); ROWLAND & CARP, *supra* note 5; SONGER, SHEEHAN, & HAIRE, *supra* note 35; Orley Ashenfelter, Theodore Eisenberg, & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995); Carp, Songer, Rowland, Richey-Tracy & Stidham, *supra* note 8; Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457 (2003); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998); Sue Davis, Susan Haire, & Donald R. Songer, *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129 (1993); Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213 (1999); Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J.

number of justices serving on the Court, we suggest that empirical studies of the members of that unique institution sometimes shade from science into biography. Moreover, as discussed above,<sup>157</sup> because the Supreme Court's jurisprudence regarding both the Establishment and Free Exercise Clauses has been unstable over time and uncertain in application, the district and court of appeals judges retained significant freedom of action in this area. Thus, while Supreme Court precedent on the Religion Clauses certainly and predictably constrained and influenced federal court litigation at the lower level to some degree, there remained substantial "play" in the doctrine as applied to individual controversies. For this reason, the body of religious freedom decisions in the federal district courts and courts of appeals is most amenable to a meaningful empirical analysis of influences upon judicial decisionmaking.

### *A. Defining and Collecting Federal Court Religious Freedom Decisions*

#### *1. Defining "Religious Freedom" Cases*

As the object for study, we created a database<sup>158</sup> of the universe of religious freedom published decisions in the federal district courts and courts of appeals during a specified period of time.<sup>159</sup> Our focus was upon decisions that involved

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1635 (1998); Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318 (1989); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997); Stidham, Carp & Songer, *supra* note 8. Of course, even before this recent upturn in scholarly interest, several scholars pioneered the way for systematic study of the lower federal courts, building the foundation and setting a standard to which to aspire for the rest of us. See, e.g., ROBERT A. CARP & C.K. ROWLAND, *POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS* (1983); Sheldon Goldman, *Carter's Judicial Appointments: A Lasting Legacy*, 64 JUDICATURE 344 (1981); Goldman, *supra* note 6; Gottschall, *supra* note 8; Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165 (1983); J. WOODFORD HOWARD, JR., *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM* (1981). The empirical work being done on the lower federal courts is also provoking greater attention among both academics and the broader legal profession. See generally Gregory C. Sisk, *Judges Are Human, Too*, 83 JUDICATURE 178 (2000) (describing public controversy about studies of ideological influences on federal appellate judges and suggesting lessons to be drawn from such studies).

<sup>157</sup> See *supra* Part I.

<sup>158</sup> As described below in *infra* Part III.B, we ultimately derived two sets of decisions based upon free exercise of religion and establishment of religion claims. As discussed earlier in *supra* Part II, we further developed four theoretical models that integrated these two categories of cases into unified approaches to the Religion Clauses of the Constitution.

<sup>159</sup> Because certain factors in our analysis applied only to judges confirmed by the Senate, our study was limited to published opinions by Article III judges in the district courts and courts of appeals, thus excluding cases from our study in which judgment was entered by a magistrate judge.



constitutional rights, and parallel federal statutory civil rights, asserted by religiously-affiliated organizations or individuals against governmental parties or the formal actions of government. For the purpose of this study, we defined “religious freedom” cases to include the following types of cases:

*Free Exercise Clause and Establishment Clause Cases.* At the heart of this database, of course, lie decisions by the lower federal courts disposing of claims under both the Free Exercise and the Establishment Clauses of the United States Constitution. As discussed below,<sup>160</sup> the Free Exercise and Establishment Clause cases were first divided into two categories for separate analysis, and then were rejoined for integrated analysis in our four theoretical models, as discussed above.<sup>161</sup>

*Free Speech Cases Involving Religious Expression.* We also included cases raising claims under the Free Speech Clause that involved governmental suppression of expression that is religious in content, both because such claims are often proxies for what effectively is a free exercise of religion claim and because petitions for the right to express religious sentiments are essential to any understanding of full religious freedom.<sup>162</sup>

*Statutory Religious Liberty and Expression Cases.* In addition to religious liberty claims grounded directly upon the federal Constitution, we also included claims based upon two statutes designed to promote the freedom of religious liberty and expression.<sup>163</sup> First, Congress enacted the Religious Freedom

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<sup>160</sup> See *infra* Part III.B.

<sup>161</sup> See *supra* Part II.

<sup>162</sup> See, e.g., *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1107 (7th Cir. 1986) (“Although freedom to express one’s religious convictions . . . might seem to nestle more comfortably within the First Amendment’s free exercise of religion clause than its free speech clause, the Supreme Court has held that restrictions on devotional speech are actionable under the free speech clause.”) (citing *Widmar v. Vincent*, 454 U.S. 263, 269 & n.6 (1981)); see also *Good News Club v. Milford Central Schools*, 533 U.S. 98, 120 (2001) (holding that “[w]hen [the school district] denied the Good News Club access to the school’s limited public forum on the ground that the Club was religious in nature, it discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause of the First Amendment”) (decision outside of time-frame of our study).

<sup>163</sup> Beyond decisions addressing the Religious Freedom Restoration Act and the Equal Access Act, which are statutory parallels to the Free Exercise and Free Speech Clauses respectively, and anti-discrimination statutes as applied to public employers (as discussed immediately below), cases that raised claims by religious organizations or individuals that were decided on purely statutory grounds were not included within this study. See, e.g., *Hager v. Sec’y of Air Force*, 938 F.2d 1449 (1st Cir. 1991) (focusing upon application of regulation to facts in addressing request of military service member who sought discharge as conscientious objector and not raising constitutional religious liberty claims); *Fogarty v. United States*, 780 F.2d 1005 (Fed. Cir. 1986) (considering proper tax treatment of priest’s income under tax statutes without addressing any constitutional religious liberty claim); *Goodrich v. Marsh*, 659 F. Supp. 855 (W.D. Ky. 1987) (deciding request of medical doctor to be released from military as religious conscientious objector on statutory and regulatory grounds with no constitutional

Restoration Act of 1993 (RFRA)<sup>164</sup> in response to the 1990 decision by the Supreme Court in *Employment Division v. Smith*.<sup>165</sup> In that decision, the Court held that enforcement of a law of general application that is formally neutral toward religion does not infringe upon the free exercise of religion, notwithstanding that application of such a law may significantly burden the exercise of religious faith through religious practice.<sup>166</sup> Through RFRA, Congress, by legislative enactment, attempted to enhance protection for exercise of religious practices by re-establishing a "compelling governmental interest" standard for evaluating any government regulation that burdens religious exercise, whether or not intentionally so designed and whether or not the statute applies generally or singles out religious practices for different treatment.<sup>167</sup> Under RFRA, both the federal and state or local governments were permitted to encumber religious practices through laws or regulations only if that burden was the least restrictive means to serve a compelling government interest.<sup>168</sup> In substance, therefore, and with particular pertinence to this study, a claim under the RFRA directly parallels, and indeed is a direct proxy for, a constitutional free exercise of religion claim under the state of the law that existed prior to the *Smith* decision. In any event, these statutory claims plainly are religious liberty claims by their very terms. Subsequently, in the 1997 decision of *City of Boerne v. Flores*<sup>169</sup>—which post-dates the decisions included in our study—the Supreme Court invalidated RFRA as applied to state and local governments, holding that

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religious liberty claim addressed); *Church of Gospel Ministry, Inc. v. United States*, 640 F. Supp. 96 (D. D.C. 1986) (holding that church was ineligible for tax exemption, but considering only tax statutes without addressing any constitutional religious liberty claim). Of course, if the claimants in such cases raised constitutional religious liberty claims in addition to the statutory claims, the cases were included on that basis. *See, e.g., Living Faith, Inc. v. Comm'r*, 950 F.2d 365 (7th Cir. 1991) (rejecting claim by Seventh-Day Adventist group that government's method of determining what organization qualified for tax-exempt status violates Free Exercise Clause and discriminates against less orthodox religions); *Graham v. Comm'r*, 822 F.2d 844 (9th Cir. 1987) (rejecting claim that denial of charitable deduction to Scientologists for church auditing courses violated Free Exercise and Establishment Clauses); *Pruner v. Dep't of the Army*, 755 F. Supp. 362 (D. Kan. 1991) (rejecting claim by service member of violation of constitutional right to free exercise of religion in context of application for conscientious objection status); *Warnke v. United States*, 641 F. Supp. 1083 (E.D. Ky. 1986) (rejecting self-employed minister's claim that denial of exclusion of income which is available where there is an employing church violated Equal Protection and Establishment Clauses).

<sup>164</sup> 42 U.S.C. §§ 2000bb to 2000bb-4 (2000).

<sup>165</sup> 494 U.S. 872 (1990).

<sup>166</sup> *Id.* at 878–82.

<sup>167</sup> 42 U.S.C. § 2000bb-1 (2000).

<sup>168</sup> *Id.* § 2000bb-1(b). On the Religious Freedom Restoration Act, see generally *James R. Browning Symposium for 1994, The Religious Freedom Restoration Act*, 56 MONT. L. REV. 5 (1995); Symposium, *New Directions in Religious Liberty*, 1993 BYU L. REV. 7 (1993).

<sup>169</sup> 521 U.S. 507 (1997).

Congress exceeded its power under the Fourteenth Amendment to enforce constitutional rights by enacting a law that purported to change the substance of a constitutional provision.<sup>170</sup> Second, Congress enacted the Equal Access Act (EAA),<sup>171</sup> which guarantees the right of public school children to use of school buildings during non-class time for expressive purposes, including religious expression. In this regard, claims for religious expression that are pressed under the Equal Access Act must be included within our collection of religious liberty decisions. Just as the RFRA was an attempted codification of the Free Exercise Clause, the EAA is a codification of the Free Speech Clause for religious (and other) expression.

*Governmental Discrimination on Religious Basis Cases.* Finally, within the scope of religious liberty cases, we include charges against governmental entities of discrimination against or inequitable treatment of individuals or organizations based upon their religious nature or identification. When the government discriminates against an individual—that is, treats the person differently from others similarly situated—because of their religious expression, behavior, or affiliation, religious liberty is denied.<sup>172</sup> Indeed, employment discrimination claims based on religious grounds against public employers parallel (and often include) claims for accommodation of the free exercise of religion.<sup>173</sup> Cases in which a religious organization protested that it was singled out for unequal treatment by government are likewise included.<sup>174</sup> Accordingly, religion-based

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<sup>170</sup> *Id.* at 515–36. On the *City of Boerne* decision, see generally Symposium, *Reflections on City of Boerne v. Flores*, 39 WM. & MARY L. REV. 601 (1998); Symposium, 20 U. ARK. LITTLE ROCK L.J. 555 (1998).

<sup>171</sup> 20 U.S.C. §§ 4071–74 (2000).

<sup>172</sup> See Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 314, 325 (1986) (introducing argument that the “point of convergence” between the Free Exercise and Establishment Clauses “is the principle of equality of religious liberty” and that “the establishment clause is best understood as providing for the equal protection of the free exercise of religion”); Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of “Neutrality Theory” and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 243, 258–60 (1999) (noting that “[f]or the most part, issues relating to religious equality have been subsumed under Free Exercise and Establishment Clause doctrine,” but arguing that “religious equality” should be recognized “as a constitutional value of independent significance”).

<sup>173</sup> See, e.g., *Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986) (considering an action by discharged government hospital chaplain on both Title VII and constitutional religion clauses grounds).

<sup>174</sup> See, e.g., *Christian Science Reading Room v. City & County of San Francisco*, 784 F.2d 1010 (9th Cir. 1986), *amended by*, 792 F.2d 124 (9th Cir. 1986) (holding that termination by public airport of tenancy of religious organization based upon erroneous belief that renting space to religious entities violated the Establishment Clause was a violation of the Equal Protection Clause).

claims under the Equal Protection Clause of the Fourteenth Amendment, the equal protection component of the Fifth Amendment, or under Title VII of the Civil Rights Act of 1964 are included, when a governmental actor or action is the target of complaint. Although arguably one also could include religious discrimination claims against private entities as implicating religious liberty in society, the focus of our study is upon more direct interaction between government and religion.<sup>175</sup>

## 2. Collecting Data from Published Decisions

In past empirical research on judicial decisionmaking, we have studied both published and unpublished decisions, availing ourselves of the full universe of decisions pertinent to a topic.<sup>176</sup> The decision whether to publish an opinion, by either a district judge or a court of appeals panel, involves a large measure of discretion by the court.<sup>177</sup> Accordingly, for many studies of judicial decisionmaking, selecting only published opinions for observation would be a serious mistake or at least greatly limit the value of the inferences drawn.<sup>178</sup> Including all forms of decisions rendered is preferable and sometimes essential, when a study examines the development or impact of a change in legal doctrine in the courts,<sup>179</sup> when attorneys or clients making strategic decisions may account

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<sup>175</sup> However, cases involving challenges to or resistance of governmental enforcement of Title VII and other anti-discrimination statutes when applied to religious organizations directly implicate religious liberty questions and are included within the scope of this study. *See, e.g.*, *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (holding that application of Title VII to prohibit discriminatory health insurance practices in religiously-affiliated school did not violate Free Exercise Clause); *Ninth & O Street Baptist Church v. EEOC*, 633 F. Supp. 229 (W.D. Ky. 1986) (denying injunction against investigation by Equal Employment Opportunity Commission of unlawful discharge claims by two former church employees).

<sup>176</sup> Andrew P. Morriss, *Developing a Framework for Empirical Research on the Common Law: General Principles and Case Studies of the Decline of Employment-at-Will*, 45 CASE W. RES. L. REV. 999, 1038–47 (1995) (discussing principles for consideration in evaluating unpublished decisions in empirical research); Sisk, Heise & Morriss, *supra* note 145, at 1407–09.

<sup>177</sup> *See generally* Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71 (2001); Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989); Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules versus Empirical Reality*, 73 JUDICATURE 307 (1990).

<sup>178</sup> Morriss, *supra* note 176, at 1039; Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 106–08 (2002).

<sup>179</sup> *See, e.g.*, Morriss, *supra* note 176, at 1059–92 (studying the decline of the employment-at-will doctrine in court decisions through published and unpublished decisions); *see also* Epstein & King, *supra* note 178, at 106–08 (criticizing a prior study as drawing unfounded inferences about the impact of a Supreme Court decision in the lower federal courts).

for decisions that are widely circulated though unpublished,<sup>180</sup> or when various case attributes understood collectively are the principal object of study.<sup>181</sup>

For these reasons, it was with some trepidation and only after internal debate and a growing appreciation of real-world necessities that we limited this phase of our study to published opinions—that is, those rulings designated for publication in the *Federal Reporter* and *Federal Supplement*—during the ten-year period from 1986–1995. Our reasons for making this decision were both normative and practical.

First, from a theoretical standpoint, we concluded that, in this context, there is no reason to believe that our selection of “publish-worthy” judicial rulings would bias the sample in a manner that would taint the outcome of this particular study.<sup>182</sup> To be sure, by examining only published decisions, we have biased the database in favor of decisions that raise highly visible, controversial, landmark, or difficult questions of religious freedom, or at least issues of religious freedom that a judicial actor found particularly interesting. Fortunately, those are precisely the types of decisions that we would wish to analyze for evidence of variation among judges in their response to significant constitutional problems upon which reasonable people could disagree. The collected published opinions are also likely to be skewed toward those cases that raised viable, as opposed to frivolous, claims and those that resulted in decisions in favor of claimants against the government, because judicial rulings that overturn the decisions of governmental entities are more likely to generate the kind of attention and interest by judges that would lead those judges to submit such decisions for publication.<sup>183</sup> Again, these are ideal cases in which to explore the influence of variables on variation in decisionmaking among judges.<sup>184</sup>

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generally when the study was limited to examination of published decisions).

<sup>180</sup> See Robel, *supra* note 177, at 956–59.

<sup>181</sup> See, e.g., Peter Siegelman & John J. Donohue III, *Studying the Iceberg From Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1150–56 (1990).

<sup>182</sup> See Merritt & Brudney, *supra* note 177, at 112 (finding, in a study of unpublished and published decisions in labor cases, that such factors as political party affiliation, partisan make-up of a panel, or “a host of other judicial attributes” played no role in selecting cases for publication, and that the personal characteristics linked with publication, “judicial age, graduation from an elite law school, and . . . management experience,” likely reflected “neutral publication preferences rather than strategic conduct”).

<sup>183</sup> See *id.* at 111–14 (finding, in a study of published and unpublished decisions in labor law cases, that “a decision [by a court of appeals panel] to reverse or the presence of a dissent, play a large role in predicting publication,” although also finding “a surprising number of reversals, dissents, and concurrences among unpublished opinions”).

<sup>184</sup> See Susan W. Johnson & Donald R. Songer, *The Influence of Presidential Versus Home State Senatorial Preferences on the Policy Output of Judges on the United States District Courts*, 36 LAW & SOC'Y REV. 657, 658 (2002) (stating that the decisions of district court judges that are published in the *Federal Supplement* are especially likely to involve cases that

To the extent that we were to look at the overall success rates of religious freedom claimants against the government, the set of published decisions is likely to overstate the degree of success (again because successful claims against the government are more likely to result in publication) and we therefore must be cautious and qualify any inferences based upon such factors. In this Article, we do later observe interesting trends in success rates for such claimants even in the pool of visible decisions found in the reporters from before and after the Supreme Court's *Smith* decision, together with an apparent shift in strategic choice of claim theories in those cases.<sup>185</sup> As we discuss further when we discuss this individual element, our failure to include unpublished opinions in this particular aspect of our study weakens our findings on that point, especially in the light of another study that included the larger universe of decisions.

More importantly, however, aggregate outcomes are not our primary interest in this study. We are concerned with what influences or motivates a judge to come out one way versus the other when government action or policy collides with religious behavior or sentiment. Decisions published as precedential are well-suited for that research purpose. Indeed, if the influence of religious or other background variables emerges in the very set of decisions that judges themselves select to publicly memorialize judicial reasoning, that would be a remarkable finding in and of itself. Again, with appropriate cautions,<sup>186</sup> the pool of published opinions is well-tailored to the purpose of this particular study.

Second, as a matter of practicality, we concluded that we simply could not do otherwise than to limit our study to published opinions, given limited access to unpublished opinions from earlier years and if we intended to maintain the broad definition of religious freedom cases discussed earlier.<sup>187</sup> To begin with, of course, there is no central storage facility for all unpublished decisions that has a searchable format to find every unpublished ruling issued by every federal court over a ten-year period that touches on religious freedom issues. While a growing subset of unpublished opinions, at least for the federal courts of appeals for more recent years, is available on Westlaw and Lexis, the collection is incomplete,

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provided "the opportunity to engage in judicial policy making" and thus are well-suited for an empirical study of judicial decisionmaking).

<sup>185</sup> See *infra* Part IV.A.4.

<sup>186</sup> One scholar has suggested that the use of uncitable, unpublished opinions may be used "to dodge sensitive issues" or "keep questionable decisions out of the glare of academic and professional review." Charles E. Carpenter, *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 256 (1998); see also Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality*, 3 J. APP. PRAC. & PROCESS 175, 181-90 (2001). Accordingly, while it would be striking to find influence of extra-judicial factors on published opinions, the absence of such a finding cannot be conclusive in light of the possibility that illustrative decisions were buried in the pile of unpublished dispositions.

<sup>187</sup> See *supra* Part III.A.1.

especially for earlier years. Indeed, based upon our observations, Westlaw and Lexis were including very few unpublished decisions during the early part of the period that is the focus of our study (1986–1995), but were collecting a much higher percentage of unpublished decisions by the end of that period. Thus, including unpublished opinions in our study would have introduced a temporal bias, since an unpublished religious freedom decision from 1995 would have been much more likely to be available in these databases than an unpublished religious freedom opinion from 1986.

More importantly, the broad search for religious freedom decisions that we wished to implement made it infeasible to include opinions that had not been digested, which is the case for all unpublished decisions for the period of our study. To cast our net widely and include religious speech, statutory religious liberty, and religious discrimination cases within our study, it was necessary to develop a search process that effectively identified decisions that addressed these matters on the merits, rather than merely mentioning a religious phrase in the context of a non-pertinent discussion.<sup>188</sup>

Accordingly, after experimentation, we settled upon three search terms on Westlaw. Each of those searches looked for certain words or phrases in the digests (that is, the set of head notes) prepared by West for opinions designated for publication. Unpublished opinions have not had digests and thus these search terms are unworkable in that context. Even with the focus upon the digests to identify those parts of opinions that include actual rulings, the ratio of false to successful hits ran about two-to-one, that is we found two decisions that were not within the scope of our study for every codeable religious freedom ruling on the merits. Reading the digest of each opinion and logging it for our study, even if it was ultimately determined to be a false hit, consumed valuable time. To run searches that did not use the digests would have significantly multiplied the number false hits and also would have dramatically increased research time as we would have had to read the entire opinion, beyond the digests, to determine whether or not the opinion even fit within the scope of the study. Moreover, including unpublished decisions in our study—and thereby losing the focusing

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<sup>188</sup> In the future, we may conduct a further study of religious freedom decisions that necessarily will be narrowed in scope in order to make it feasible to include the subset of unpublished opinions available on Westlaw. For this follow-up study, we would focus solely upon constitutional claims under the Free Exercise and Establishment Clauses, thereby eliminating the statutory religious liberty, free speech, and equality/non-discrimination cases that not only expanded the number of cases in this study but made it necessary to include very broad search terms for exploring the electronic database. By restricting our search for narrower phrases such as “free exercise of religion” and “establishment clause” or “establishment of religion,” we may be able to conduct a manageable exploration of the unpublished decisions and conduct a comparison with the pure Free Exercise and Establishment Clause aspects of this study. Indeed, we expect that this field of study could quite adequately and profitably occupy much more of our future research time.

benefit of search terms that examined opinion digests—would have increased exponentially the number of opinions to be read and included or excluded. Based upon trial-and-error tests from one year of federal court decisions, we estimated that the number of opinions to be reviewed for the entire ten-year period for our study would have grown from 2,000 to an unmanageable 10,000 decisions, especially given the additional time that would be taken to evaluate and code unpublished decisions that did not contain syllabi and digests.

Once having decided to focus upon decisions published in the *Federal Supplement* and *Federal Reporter*, we conducted a search on Westlaw for all decisions<sup>189</sup> in which the digests of the opinions prepared by West include the terms “free exercise,” “establishment clause,” “establishment of religion,” “religious freedom restoration act,” or “equal access act.” In addition, we searched for the appearance in the opinion digests of “free speech,” “equal protection,” “due process,” “title vii,” and “discrimination” as connected to religious phrases.<sup>190</sup> In sum, we formulated three searches for use on Westlaw:<sup>191</sup>

- di(“free exercise” “establishment clause” “establishment of religion” “religious freedom restoration act” “equal access act”)
- di((“free! speech” “equal protection” “due process” discriminat! “title vii”) and religio! pray! church bible god jew! judai! moslem muslim islam! krisha jesus christ!)
- di(religio!)

The third search, for any decision with the root “religio!” (thus covering both “religion” and “religious”) in the digest, served as a catch-all to ensure that nothing was missed by the compass of the first two searches. These searches were run in both the CTA (federal court of appeals) and DIST (federal district court)

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<sup>189</sup> By adopting the universe of decisions in the selected time period as the basis for collection of the data, we avoid issues of sampling in this study, other than the problem of our unavoidable omission of unpublished decisions and the question about representativeness of the time period that we selected, as we discuss below, *infra* Part III.A.3.

<sup>190</sup> The U.S. Court of Appeals Data Base for which Donald R. Songer at the University of South Carolina was the principal investigator and which is maintained at <http://www.polisci.msu.edu/pljp/ctadata.html> (last visited Mar. 16, 2004) is an invaluable resource. See generally Frank B. Cross, *Comparative Judicial Databases*, 83 JUDICATURE 248 (2000) (comparing this database to others). However, as will be apparent in what follows, the scope of religious freedom decisions that we wish to explore is more expansive and multifarious than that captured in the U.S. Court of Appeals Data Base in such categories as free exercise of religion and establishment of religion.

<sup>191</sup> Limitations on the number of characters that may be included in a search query on Westlaw necessitated our breaking the inquiries into separate searches rather than combining them into one, resulting in significant but easily identifiable overlap in the cases uncovered by both searches.



electronic databases on Westlaw. In addition, the history of each case was followed on Westlaw, to make sure that any published decisions in that history were included, even if they should have escaped the dragnet of the Westlaw search phrases.<sup>192</sup>

### 3. *Time Period for Data Collected*

For our study, we adopted the ten-year period from 1986 through 1995. This ten-year period spans three different presidential administrations—Reagan, Bush, and Clinton—as well as significant shifts in Supreme Court attitude toward both the Free Exercise and Establishment Clauses. By concluding our study a little less than two years before the Supreme Court invalidated the Religious Freedom Restoration Act as exceeding Congress's authority under the Fourteenth Amendment as applied to the states and local governments,<sup>193</sup> we avoid any distorting effects that may have been created by that decision.<sup>194</sup> Moreover, by selecting these particular years, we can also include a comparative analysis of decisions dating before and after the Supreme Court's landmark 1990 holding in *Employment Division v. Smith*<sup>195</sup> that reformulated free exercise doctrine from a general demand for a compelling justification for harmful governmental conduct into something more like an equal protection or neutrality guarantee.<sup>196</sup>

### 4. *Judicial Participations as Data Point and Including District and Court of Appeals Judges in the Same Analysis*

Consistent with a growing body of research on judicial decisionmaking, rather than using each individual judge as the data point, the primary focus of our

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<sup>192</sup> As one positive sign of the adequacy with which our Westlaw searches swept the religious freedom field, only ten published opinions (out of the total of 729 coded decisions in our study) were added by references to case histories.

<sup>193</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>194</sup> However, when some additional time has passed to allow for a larger sample of post-*Boerne* decisions to be studied, it might be interesting to explore and compare lower court judicial decisionmaking in the free exercise of religion context before and after this monumental decision. The adoption of any time frame imposes a limitation on the number of observations, which depending upon the research goal may introduce serious bias into a sample, because observations recorded for that time frame may be aberrational. For our purposes, the question of sample bias should not raise concern. If there is evidence of background influences upon a judge's disposition of a religious freedom decision in 1986-1995, there is no reason of which we are aware to assume that such human behavior first evolved after 1985 or has disappeared after 1995. Nonetheless, extending our study backward and forward through time would be a worthy future research project.

<sup>195</sup> 494 U.S. 872 (1990).

<sup>196</sup> For a discussion of results based upon analysis of decisions rendered before and after *Smith*, see *infra* Part IV.A.4.

study was upon “judicial participations.”<sup>197</sup> Each “judicial participation” consisted of a single judge’s ruling in a single case. Each district judge’s ruling was coded separately, as was that of each of the multiple judges on court of appeals panels. In handling the matter in this way, we can code separately (on the dependent variable) for concurring and dissenting judges in court of appeals decisions. Moreover, by using such individual votes as the point of analysis, we allow the database to include multiple opinions by some of the same judges without attempting to account for that by a weighted ratio measure.<sup>198</sup> In addition, by using the individual decision as the point of departure, we can measure other variables that are case-specific, as well as one judge-specific variable—seniority or tenure on the bench—that varies across time.<sup>199</sup> Finally, because we conducted one separate analysis for different time spans within the database,<sup>200</sup> entering separate data for each “judicial participation” was essential.

At least in theory, use of judicial participations may create an autocorrelation problem—that is, overestimating the influence of judges who participated multiple times as compared to those judges who participated in fewer or only one decision. Nancy Scherer’s exploration of the autocorrelation in the context of judicial decisionmaking suggests that this problem is not likely to produce biased results when looking at large numbers of judicial decisions.<sup>201</sup>

Nonetheless, following in part Scherer’s lead, we adopted alternative methods to control for this possible problem. First, while maintaining judicial participations as the data point, we introduced a dummy variable to distinguish between judges with only one participation and those with multiple participations. (For each judicial participation involving a judge who participated in multiple decisions, the variable MULT-VTE was coded as “1.”) The use of such a dummy variable is designed “to detect whether there is something unique about the voting behavior of judges who voted multiple times versus those who voted only

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<sup>197</sup> James J. Brudney & Corey Ditslear, *Designated Diffidence: District Court Judges on the Court of Appeals*, 35 LAW & SOC’Y REV. 565, 576 (2001); James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1696, 1700 (1999); Nancy Scherer, *Blacks on the Bench*, at appendix, unpublished manuscript (2004) [hereinafter Scherer, *Blacks on the Bench*]; Songer & Tabrizi, *supra* note 7, at 511 (discussing use of judges’ votes in cases as point of analysis).

<sup>198</sup> Using judicial participations makes it possible to keep all dependent variables dichotomous, even though many of the same judges, especially at the court of appeals level, participated in more than one case within the decisions sets for our study.

<sup>199</sup> To use each judge as a datapoint, thus collecting composite information for judges participating in more than one decision, necessarily would have eliminated all of the case-specific control variables, thus greatly impoverishing the study.

<sup>200</sup> See *infra* Part IV.A.4.

<sup>201</sup> Nancy Scherer, *Who Drives the Ideological Makeup of the Lower Federal Courts in a Divided Government*, 35 LAW & SOC’Y REV. 191, 208–10 (2001) [hereinafter Scherer, *Ideological Makeup*]; Scherer, *Blacks on the Bench*, *supra* note 197, at app.

once.”<sup>202</sup> Rather than include this dummy variable in regression runs, we used it to create separate regression runs for judges with multiple participations and judges with single participations for comparison. We found little systematic difference, which strengthened our confidence in the propriety of the judicial participation approach (and what differences existed, mainly in terms of significant variables falling out of significance, appears attributable to the fact that the number of single-vote judge participations was much smaller (257) than multiple-vote judge participations (1227)).

Second, given that multiple-vote judge participations were more common for appellate judges than trial judges, we also coded for the type of court issuing the decisions (COURT), that is, whether the judge was participating in a district court decision (coded as “0”) or an appellate decision (coded as “1”); whether the judge was the author (AUTHOR) of an opinion in the ruling, (coded as “0” for no and “1” for yes); and whether a judge on an appellate panel was a member of the particular court of appeals or was a member of another court sitting by designation (DESIGNAT) (coded as “0” for no and “1” for yes). Ancillary runs that allowed us to compare court of appeals and district court judges and to exclude judges who were sitting on a court only by designation demonstrated few systematic differences, some of which are discussed later, and further increased our confidence in the basic model and standard set of variables.

Because these various ancillary runs were conducted primarily to cross-check our standard models, and because by their nature these runs sometimes involved low N counts that submerged significant variables and created attendant multicollinearity problems, we generally do not regard these ancillary results as reliable in themselves or worthy of separate discussion. We have not separately reported the results of these ancillary regression runs through tables in this Article, but the information is available from the authors.

### B. Establishing Two Sets of Decisions and Coding the Decisions

As the decisions were collected, they were placed into two sets of decisions, which thus required evaluating or “coding” each individual decision.<sup>203</sup> In addition to being placed into one of two sets (or both on rare occasions), each

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<sup>202</sup> Scherer, *Ideological Makeup*, *supra* note 201, at 209–10; *see also* Scherer, Blacks on the Bench, *supra* note 197, at app. (discussing the use of “a dummy variable controlling for judges who vote once versus multiple times,” which “is intended to detect whether there is a systematic difference in the voting behavior between these two groups” and finding that “[t]he coefficient on the dummy variable was not significant”).

<sup>203</sup> Our coding of each decision retrieved in the Westlaw searches may be found at <http://courseweb.stthomas.edu/gcsisk/religion.study.data/cover.html>. In the event this data material ever should not be found at this site, a link to a data site will always be maintained on Professor Gregory Sisk’s personal web page, which in turn will be linked to his faculty web page, as may be found through any internet search engine.

opinion (or rather each judge's ruling) was further recorded by specific types of claims so as to allow alternative separate treatment for purposes of comparison. What follows is the somewhat dense and painstakingly detailed description or "code book" for allocating decisions between the sets and of each opinion into claim and case types. While the explanation of these "coding" decisions may be mind-numbing to many readers and appears rather complicated when committed to writing, the measuring process was not difficult to implement or overly complex in operation (although it was time-consuming). Indeed, the level of detail in setting out the formula in advance of the work not only assures greater objectivity (as opposed to excessive ad hoc manipulation) but makes the opinion evaluation process flow more smoothly.

To begin with, as mentioned earlier, many decisions retrieved by our expansive Westlaw searches were simply outside the scope of the study.<sup>204</sup> These searches uncovered a multitude of cases that, while containing such phrases as "free exercise," "equal protection," "prayer," or "religion" in the digest proved not to be dispositions on the merits of federal religious freedom claims as defined for this study.<sup>205</sup> It is better to cast too widely and bring up some debris in the nets than to cast too narrowly and miss many of the fish.

Decisions addressing only non-dispositive procedural or other issues that did not engage with the merits of the religious claim likewise were outside the framework of this study. Moreover, our study was limited to assertions of rights to religious freedom against the sovereign, thus meaning that we included only cases in which governmental entities—federal, state, or local—were parties or in which the formal acts of government—legislative enactments, executive regulations, municipal ordinances, or decisions by a government officer—were challenged.<sup>206</sup> Accordingly, decisions involving accusations by individuals that

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<sup>204</sup> See *supra* Part III.A.2.

<sup>205</sup> See, e.g., *NLRB v. Illinois-American Water Co. S. Div.*, 933 F.2d 1368, 1374 (7th Cir. 1991) (addressing whether employer's expression of views about union representation was conduct that restrained or coerced employees in "free exercise" of their labor rights); *In re Certain Asbestos Cases*, 113 F.R.D. 612 (N.D. Tex. 1986) (discussing, in civil discovery dispute, the need for autopsies and mentioning that religious concerns may need to be considered in ordering such); *United States v. Lewis*, 649 F. Supp. 1109 (W.D. Mich. 1986) (considering leaders of religious sect who were charged with enslaving members, but no religious rights or liberty defense was raised or addressed); *Elbe v. Yankton Indep. Sch. Dist.* No. 63-3, 640 F. Supp. 1234, 1237 (D. S.D. 1986) (deciding on basis of state constitutional law, obviating necessity to address federal question). A list of all inapplicable decisions with citations and the reasons for their exclusion from the study is available, together with the coding for the decisions included in the two root sets of decisions, at <http://courseweb.stthomas.edu/gcsisk/religion.study.data/cover.html>.

<sup>206</sup> By limiting our study to the traditional religious freedom clash between citizens and the legislative-executive departments of government, we have also excluded cases in which First Amendment questions arise regarding the exercise of authority by the judicial branch of government. See, e.g., *United States v. Ofchinick*, 937 F.2d 892 (3d Cir. 1991) (holding that

they suffered employment discrimination on religious grounds by private employers under employment discrimination statutes such as Title VII were inapposite.<sup>207</sup> Likewise, intramural disputes between religiously-affiliated organizations or persons challenged have been excluded, although many such cases implicate the First Amendment, because secular courts are precluded from deciding questions of religious doctrine or discipline.<sup>208</sup> In sum, all private civil litigation in which no government entity was a party nor was any governmental act challenged were beyond the scope of this study. In addition, while some immigration cases raise questions of the relationship between government and religion at the international level, especially those in which aliens seek asylum in the United States by reason of feared religious discrimination if returned to their

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district court's probationary order requiring restitution did not violate free exercise rights of defendant by depriving him of resources by which to make charitable contributions to church); *Abortion Rights Mobilization, Inc. v. Baker*, 110 F.R.D. 337 (S.D.N.Y. 1986) (holding, in a case challenging the tax-exempt status of the Catholic Church, a religious organization in civil contempt for failing to comply with a discovery order despite religious objections). Similarly, while prosecutorial (executive) decisions regarding prosecution of crime are covered, including prosecutorial discrimination on religious grounds, *see, e.g., United States v. Kerley*, 787 F.2d 1147 (7th Cir. 1986) (rejecting claim of selective prosecution by individual who refused to register for draft for religious reasons); questions concerning judicial conduct or jury religious bias are outside the scope of the study, *see, e.g., United States v. Heller*, 785 F.2d 1524 (11th Cir. 1986) (granting mistrial because of religious slurs by jury).

<sup>207</sup> *See, e.g., Protos v. Volkswagen of America, Inc.*, 797 F.2d 129 (3d Cir. 1986) (employment discrimination suit against private employer for failing to accommodate employee whose religious belief prohibited her from working on Sabbath). *See also supra* Part III.A.1 (explaining exclusion of private discrimination cases from scope of study). However, as discussed earlier and again below, constitutional challenges to, or resistance of, governmental enforcement of anti-discrimination statutes when applied to religious organizations (free exercise claims) or constitutional challenges to the validity of statutes prohibiting religious discrimination (establishment claims) bring governmental actors back into the picture and thus directly implicate the religious freedom subject of this study.

<sup>208</sup> *See, e.g., Paul v. Watchtower Bible & Tract Soc'y of New York, Inc.*, 819 F.2d 875, 876 (9th Cir. 1987) (dismissing tort claim by disassociated member of Jehovah's Witnesses arising from church's requirement that members "shun" her, holding that practice of "shunning" is protected by First Amendment); *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir. 1986) (holding that, because the First Amendment precludes secular authorities from interfering with the "internal ecclesiastical workings and disciplines of religious bodies", the district court lacked jurisdiction over an action by a minister challenging his enforced retirement under church disciplinary rules); *Anderson v. Worldwide Church of God*, 661 F. Supp. 1400 (D. Minn. 1987) (holding that First Amendment barred claims by contributors that church fraudulently represented that the world was coming to an end); *Kendysh v. Holy Spirit Byelorussian Autocephalic Orthodox Church*, 683 F. Supp. 1501 (E.D. Mich. 1987) (presuming validity of church rules in resolving claim by secretary of consistory of the Byelorussian Autocephalic Orthodox Church against local parish for determination of ownership of parish property).

country of origin,<sup>209</sup> those decisions do not fit comfortably into the category of religious freedom claims by a citizen against his or her own government that is the focus of this study.

For purposes of analysis, we divided cases into two general sets of decisions:

- “Free Exercise/Accommodation”

- “Establishment”

A general description of each set of decisions follows, together with the details of the coding formula that determined into which set an opinion was entered. Coding of claim, case, and claimant information for each set of decisions is described in the next part of this article, together with the findings regarding these case-specific variables<sup>210</sup> (the judge-specific variables are discussed later).<sup>211</sup>

### 1. “Free Exercise/Accommodation” Decision Set

The first set of decisions consists of cases in which the claimant requests affirmative accommodation of religious-based behavior or expression—whether a plaintiff challenges or demands governmental action, a defendant resists governmental constraints, or an intervenor objects to governmental conduct. The claimants in the cases falling within this category seek positive judicially-compelled action in their favor; that is, they are trying to force the government to take a step toward religious accommodation (as opposed to demanding that government step away from special treatment of religion, as in Establishment Clause cases discussed below<sup>212</sup> with respect to the second set of decisions). The foundational claim in this category arises under the Free Exercise Clause of the First Amendment and indeed the substantial majority of cases in this category include constitutional free exercise claims. However, this decision set also includes other types of religious liberty claims for accommodation, including free speech claims, statutory religious liberty claims, and equal treatment claims.

Accordingly, the opinions for this set were coded as follows:

Each opinion was reviewed to determine whether it contained a “merits” ruling<sup>213</sup> on a claim based upon:

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<sup>209</sup> See, e.g., *Yousif v. I.N.S.*, 794 F.2d 236, 243–44 (6th Cir. 1986) (holding that alien seeking asylum had not established a “well-founded fear of persecution” because he failed to present credible evidence that he would be singled out for persecution if returned to Iraq or that his fear of being persecuted as a Chaldean Christian was well-founded).

<sup>210</sup> See *infra* Part IV.

<sup>211</sup> See *infra* Part V.

<sup>212</sup> See *infra* Part III.B.2.

<sup>213</sup> For a definition of a “merits” ruling for purposes of this study, see *infra* Part III.B.3.a.

- (1) the Free Exercise Clause of the First Amendment,
- (2) the Free Speech Clause of the First Amendment (if religious expression is at issue),
- (3) the Religious Freedom Restoration Act,<sup>214</sup>
- (4) the Equal Access Act (if religious expression is at issue), or
- (5) the Equal Protection Clause of the Fourteenth Amendment, the equal protection component of the Fifth Amendment, or statutory anti-discrimination laws involving equal treatment on the basis of religious behavior or identity.

Cases involving no claims of these types were excluded as outside the scope of the study (except of course for Establishment Clause cases, which were coded for inclusion in the second decision set, as described below).

## 2. "Establishment" Decision Set

The second set of decisions consists of cases in which the claimant challenges affirmative governmental special protection or recognition of religion as violative of the Establishment Clause. As the counter-model to the type of claims in the Free Exercise/Accommodation set of decisions, the claimants in the cases falling within the Establishment category seek to undo governmental action that has exempted religious behavior or expression from general regulation or that has favored, symbolically or concretely, religious sensibilities. Thus, every case placed into this set involved a claim grounded in the Establishment Clause of the First Amendment.

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<sup>214</sup> Toward the close of the time period covering the decisions in these sets, the Religious Freedom Restoration Act (RFRA) § 3, 42 U.S.C. § 2000bb (2000), was increasingly under attack in the courts as unconstitutional, at least as applied to state and local governments. The Supreme Court ultimately invalidated the RFRA as applied to the states. *City of Boerne v. Flores*, 521 U.S. 507 (1997). Court decisions that resolved claims on the merits for application of the RFRA are within the scope of this study, even if that decision also addressed the constitutionality question. However, court rulings that focused solely upon the constitutionality validity of RFRA—that is, decisions that invalidated RFRA and thus declined to apply it to the merits of a claim—are excluded as they raise tangential issues that do not translate cleanly into a judicial attitude on the underlying question of religious freedom. *See, e.g., Flores v. City of Boerne*, 877 F. Supp. 355, 358 (W.D. Tex. 1995) (holding RFRA unconstitutional), *rev'd*, 73 F.3d 1352 (5th Cir. 1996), *rev'd*, 521 U.S. 507 (1997).

### 3. Coding Directions Pertinent to Both Decision Sets

#### a. Defining "Merits" Rulings

What counts as a "merits" ruling as applied in our coding of these opinions? For district court judges, the ruling must have accepted or rejected a particular claim on its merits. Thus, a ruling on justiciability—such as the standing of the party to bring the claim or on other procedural or preliminary questions that did not engage with the merits of a religious-based claim—fell outside the scope of the study.<sup>215</sup> If, however, the judge's ruling established the validity or invalidity of the claim on its merits, even if it was not a final judgment, the ruling counted as dispositive for our purposes. For example, the granting of a preliminary injunction—which requires a determination by the judge that the party is substantially likely to prevail on the merits<sup>216</sup> and which is immediately appealable<sup>217</sup>—qualified as a "merits" ruling because it had immediate real-world consequences and reflected the judge's evaluation, even though not final, of the proper outcome.<sup>218</sup>

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<sup>215</sup> See, e.g., *Minnesota Fed'n of Teachers v. Randall*, 891 F.2d 1354, 1360 (8th Cir. 1989) (holding that an individual, but not this organization, had standing to challenge constitutionality of statute allowing public high school students to take advanced courses at religiously-affiliated colleges); *Pulido v. Bennett*, 860 F.2d 296, 298 (8th Cir. 1988) (reversing district court and holding that taxpayers had standing to bring Establishment Clause challenge to administration of spending program for funding services at parochial schools); *Americans United for Separation of Church & State v. Grand Rapids Sch. Dist.*, 835 F.2d 627, 634 (6th Cir. 1987) (considering attorney's fees request subsequent to prior decision on merits of case); *Blount v. Redmond*, 649 F. Supp. 319, 322 (D. Me. 1986) (holding that *Younger* abstention doctrine mandated dismissal of action by born-again Christians, who held religious belief that their children had to be educated at home and sought temporary and permanent injunctive relief preventing commencement of truancy actions against them in state court); *Lawson v. Wainwright*, 108 F.R.D. 450, 459 (S.D. Fla. 1986) (holding that class action certification was appropriate in an action challenging Florida prison authorities' refusal to permit inmates access to religious literature); *Jewish War Veterans of the United States v. United States*, 695 F. Supp. 1, 3 (D. D.C. 1987) (considering proper venue for action by Jewish veterans organization challenging placement of Latin cross as memorial at Marine base).

<sup>216</sup> *DSC Comm. Corp. v. DGI Tech., Inc.*, 81 F.3d 597, 600 (5th Cir. 1996); *SEC v. Lauer*, 52 F.3d 667, 671 (7th Cir. 1995).

<sup>217</sup> *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 289–90 (1940).

<sup>218</sup> See, e.g., *Doe v. Human*, 725 F. Supp. 1499, 1502 (W.D. Ark. 1989) (granting preliminary injunction to parents challenging teaching of Bible classes in public school during regular school hours on grounds parents were likely to prevail on merits of Establishment Clause challenge), *later ruling*, 725 F. Supp. 1503 (W.D. Ark. 1989) (granting permanent injunction on same grounds), *aff'd*, 923 F.2d 857 (8th Cir. 1990) (table); *Wallace v. Washoe County Sch. Dist.*, 701 F. Supp. 187, 192 (D. Nev. 1988) (denying motion for preliminary injunction and finding that church failed to establish the likelihood of prevailing on merits of challenge on free speech grounds to school district policy prohibiting church rental of school



For court of appeals judges, the definition of a “merits” ruling must account for the variety of dispositions that an appellate court may make of a trial court judgment, including: affirming; reversing; reversing and remanding; and affirming in part and reversing in part.<sup>219</sup> For purposes of some studies, separately accounting for these dispositions may be important, but not here. We are concerned with general judicial attitudes towards religious liberty claims, not with keeping a tally of the number of claims in a particular case or keeping score on the win-loss record for the district courts upon review in the court of appeals. More importantly, we are focusing upon individual religious liberty claims within a case, rather than the resolution of the case as a whole. Nonetheless, a formula for treating appellate decisions that did not definitively conclude the litigation was necessary.

The outright affirmance or reversal of a district court’s grant or denial of relief on a religious liberty claim (which accounts for the substantial majority of the appellate decisions included in these data bases) was easily coded. Thus, the affirmance or reversal of a final judgment in a district court on the merits of any single religious liberty claim (even if other claims were subjected to a different disposition) was included as a “merits” decision. (Importantly, as discussed next,<sup>220</sup> a decision was treated as a favorable merits disposition to the claimant if the claimant succeeded on any significant claim, which translated for our purposes into claimant success if any favorable district court claim ruling was affirmed or any unfavorable district court claim ruling was reversed, regardless of the disposition of other claims.) With respect to a court of appeals reversal or vacation—that is, the appellate court’s upsetting of a definitive trial court result—the decision was coded as a “merits” ruling with an outcome result opposite to that of the district court, even if it included a remand for resolution of additional issues, *provided* that the reversal or vacation involved an evaluation of a significant element of the merits of the religious claim<sup>221</sup> (as contrasted with a

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facilities for regular Sunday worship services because this exclusion served compelling interests of maintaining separation of church and state).

<sup>219</sup> The U.S. Court of Appeals Data Base lists ten different possible dispositions of lower court or agency decisions by the appellate court: stay (petition or motion granted); affirmed (or affirmed and petition denied); reversed (including reversed & vacated); reversed and remanded (or just remanded); vacated and remanded (also set aside & remanded or modified and remanded); affirmed in part and reversed in part (or modified or affirmed and modified); affirmed in part, reversed in part, and remanded; affirmed in part, vacated in part, and remanded; vacated; petition denied or appeal dismissed; certification to another court, or, not ascertained. U.S. Court of Appeals Data Base 101, at <http://www.polisci.msu.edu/pljp/ctacode.PDF> (last visited Mar. 29, 2004). As discussed above, for our purposes, the focus is not upon the formal label of the disposition but rather upon the substantive effect of the appellate ruling upon the district court’s grant or denial of a claim in the decision on review, that is, the impact upon the person or entity that is bringing the claim.

<sup>220</sup> See *infra* Part III.B.3.b.

<sup>221</sup> See, e.g., *Franklin v. Lockhart*, 890 F.2d 96, 97 (8th Cir. 1989) (reversing dismissal of

ruling that turned upon a purely procedural error or a determination of standing and thus was excluded from the study).<sup>222</sup>

### b. *Decisions Involving Multiple Claims*

On a question related to, and intertwined with, identification of a decision as on the “merits,” what is the coder to do with cases involving multiple claims, in which some claims are rejected and other claims are accepted? As noted previously, such a decision does constitute a “merits” ruling because there was a disposition of at least one claim on the merits. But how should the direction in terms of claimant success on one claim be recorded if other claims were unsuccessful?

For our study, the opinion was coded in the overall outcome and in the pertinent claim type categories as “1” (favorable to claimant) if *any* significant accommodation claim was accepted on free exercise or related grounds or if *any* significant government action was invalidated against the measure of the Establishment Clause.<sup>223</sup> In some other legal contexts, it may be important to reflect the presence of mixed results in a single case, so that important rulings on individual claims are not missed because they appear within a case in which other claims are also decided.<sup>224</sup> By contrast, in this study of general judicial attitudes

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prison inmate’s complaint and holding that allegations that prison work involved handling of manure and dead animals contrary to Muslim faith were sufficient to state free exercise claim); *McElyea v. Babbitt*, 833 F.2d 196, 200 (9th Cir. 1987) (reversing summary judgment against an inmate seeking accommodation in prison for exercise of religion and remanding for determination of inmate’s sincerity in religious belief).

<sup>222</sup> See, e.g., *Sullivan v. Syracuse Hous. Auth.*, 962 F.2d 1101, 1110 (2d Cir. 1992) (reversing district court ruling that plaintiff had no standing to claim that housing authority had violated the Establishment Clause in its operation of community center and remanding for consideration on merits); *Kurtz v. Baker*, 829 F.2d 1133, 1145 (D.C. Cir. 1987) (reversing district court and holding that nontheist philosophy professor lacked standing to challenge refusal of congressional chaplains to invite nontheists to deliver secular remarks during period reserved for opening prayer).

<sup>223</sup> By “significant,” we did not intend to open the door to a subjective assessment of the importance or centrality of a particular claim or issue to the overall lawsuit, but rather anticipated excluding only those successful claims or issues that were trivial in nature or that did not provide any practical benefit to the litigant. Cf. *Texas State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789, 791–92 (1989) (rejecting a test for prevailing party status to become eligible for an award under attorney’s fee-shifting statutes that would require a party to prevail on the “central issue” in the litigation and instead holding that a prevailing party need only have succeeded on “any significant issue in [the] litigation which achieve[d] some of the benefit the parties sought in bringing the suit”). In any event, after adopting this coding direction, no cases were excluded on the basis that a successful claim was nonetheless insignificant.

<sup>224</sup> See, e.g., *Brudney, Schiavoni & Merritt*, *supra* note 197, at 1680 (explaining that, in context of appellate review of labor decisions by the National Labor Relations Board, “issue-

toward religious freedom claims, the fact that a successful claim was buried within a case raising unsuccessful claims did not diminish the importance of the statement made by a judicial ruling upholding any single claim or assertion by an individual or group against the sovereign government. Moreover, the substantial majority of cases in our database involved a single claim against the government or a challenge to a governmental act. Thus, to treat both single-claim and multiple-claim cases comparably required developing a means of evaluating each case in a holistic manner that resulted in a comparable and unitary coding for each case.<sup>225</sup>

Accordingly, for purposes of our study, if the status quo was upset in any meaningful sense by forcing governmental steps to accommodate religious behavior or expression or by imposing a judicial limit upon governmental action involving religion that otherwise would proceed, the decision was coded as “1” for positive success on the overall success dependent variable and on the pertinent claim type dependent variable. Rulings by the court on the merits of additional claims falling into other claim categories arising in the same case likewise were coded as “1” if any claim of that type is successful or as “0” if all claims of that type fail on the merits. (If there were no merits ruling on a particular claim type, the case simply was not coded on that claim type and thus was omitted in any independent analysis of cases focused upon that claim type.)<sup>226</sup>

### *c. Decisions Involving Both Free Exercise and Establishment Claims*

Our general expectation was that these decisions would fall into one set of decisions or the other—Free Exercise/Accommodation or Establishment—but not both. We established coding rules that were designed to direct rulings into a single category (1) by focusing upon a claimant’s affirmative claim rather than defensive responses raised by the opposing party, and (2) by treating cases in which a party requested accommodation under the Free Exercise Clause as falling solely into that set, even if that party bolstered the claim by arguing that

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specific analysis” allows considering the complexities of each case and facilitates recognition of certain substantive issues that generate unusual levels of controversy).

<sup>225</sup> There is precedent in empirical studies of judicial decisionmaking for taking such a “holistic” view of the outcome of cases challenging governmental action. *See* Cross & Tiller, *supra* note 156, at 2168 n.63 (explaining, in coding decisions of the United States Court of Appeals for the District of Columbia Circuit for judicial deference or lack thereof to administrative decisions, that “administrative law cases commonly raise a variety of discrete issues” and thus “[i]f the court upheld the challenge to agency action in any substantial part and granted the challenger a significant measure of the relief sought, the case was coded as upholding the challenge”).

<sup>226</sup> For discussion of coding of particular claims types in the context of the Free Exercise/Accommodation set of cases, *see infra* Part IV.A.1.

implementation of government regulation would entangle the government in religious affairs in a manner that implicated the Establishment Clause.

First, for purposes of classifying a particular ruling as a Free Exercise Clause case or an Establishment Clause case, the plaintiff was regarded as the master of his or her complaint and thus entitled to identify the constitutional claim being presented against the government entity.<sup>227</sup> (Likewise, if the party pressing the claim for accommodation was a defendant in a civil or criminal case, the claimant defined the nature of the case by the constitutional defense raised.) Accordingly, when the claimant asserted a constitutional right under one clause and was met by a governmental defense on another clause, the claimant's assertion controlled. As a typical example, when the government defended its refusal to recognize a request based upon the Free Exercise Clause by asserting that such an exemption or accommodation would violate the Establishment Clause,<sup>228</sup> the case was classified solely in the Free Exercise Clause category. That is, it was categorized by the affirmative claim asserted by the party challenging the government and not the constitutional defense interjected by the government. (However, we did code for separate analysis each instance in which the government responded to a Free Exercise/Accommodation claim with an Establishment Clause defense and the court addressed that defense on the merits.<sup>229</sup>) In sum, for purposes of this study, we regarded the Religion Clauses primarily as a sword that citizens may wield against their government, not as a shield that the government may use to fend off its own citizens.

Second, when a party seeking an exemption on religious grounds from a statutory or other governmental requirement asserted a claim based upon the Free Exercise Clause or other related bases and then appended a subsidiary and intertwined claim that the imposition of the statutory requirement would entangle the government with religion in violation of the Establishment Clause,<sup>230</sup> the

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<sup>227</sup> *Cf. Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) (holding that, under the "well-pleaded complaint" rule in federal civil litigation, the plaintiff is "the master of the complaint" and thus permitted to choose which claims to raise and which to forgo).

<sup>228</sup> *See, e.g., Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 694 (9th Cir. 1986) (when Indians contested Forest Service plan to permit timber harvesting and road construction in national forest area sacred to Indians as burden on free exercise of religion, government contended administration of forest to accommodate religious practice violated Establishment Clause), *rev'd*, 485 U.S. 439 (1988); *Mozert v. Hawkins County Pub. Sch.*, 647 F. Supp. 1194, 1202-03 (E.D. Tenn. 1986) (when fundamentalist Christian parents alleged that requiring children to read from textbooks offensive to their religious beliefs burdened the students' right of free exercise of religion, the public education defendants responded that any attempt to provide alternative textbooks acceptable to plaintiffs would violate the Establishment Clause through excessive entanglement with religion), *rev'd*, 827 F.2d 1058 (6th Cir. 1987).

<sup>229</sup> *See infra* Part IV.A.1.

<sup>230</sup> *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (setting forth three-part test for evaluating validity of statute under Establishment Clause: first, the statute must have a secular

decision was coded solely for the Free Exercise/Accommodation set and was not also coded for the Establishment Clause set.<sup>231</sup> (Again, however, the opinions were coded to note the presence of a subsidiary or attendant Establishment Clause claim for separate analysis.<sup>232</sup>) In sum, when a claimant asserted a request for accommodation and invoked one of the bases covered within the Free Exercise/Accommodation line of cases, the case was coded into that decision set.

However, infrequently (on five occasions to be exact), the same case presented significant and separate Free Exercise Clause and Establishment Clause claims asserted affirmatively by different parties. To be precise, the party asserting the Establishment Clause claim was different from the party asserting the Free Exercise Clause claim, and neither party was the government wielding an argument defensively.<sup>233</sup> In these rare circumstances, the ruling was classified as

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purpose; second, its primary effect must be one that neither advances nor inhibits religion; and third, the statute must not foster an excessive entanglement with religion).

<sup>231</sup> See, e.g., *St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958, 962–63 (S.D.N.Y. 1989), *aff'd*, 914 F.2d 348 (2d Cir. 1990) (addressing challenge by church to limitations in alteration of building imposed by landmark designation as a denial of free exercise of religion and also contending that statutory provision for evaluation of a request for alteration of a building would result in excessive entanglement of government with affairs of church in violation of Establishment Clause); *Bethel Baptist Church v. United States*, 629 F. Supp. 1073, 1080–88 (M.D. Pa. 1986), *aff'd*, 822 F.2d 1334 (3d Cir. 1987) (addressing challenge by church to mandatory participation of church employees in Social Security system, raising claim for exemption based on interference with free exercise of religion and also contending inclusion of religious employees within system would result in excessive entanglement with religion in violation of Establishment Clause). Accordingly, for consistency's sake, all requests for religious exemption or accommodation are classified as Free Exercise Clause claims, even if Establishment Clause claims are also included.

<sup>232</sup> For discussion of the coding of separate claims-types within the Free Exercise/Accommodation set of decisions, see *infra* Part IV.A.1.

<sup>233</sup> *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 448 (9th Cir. 1994) (plaintiff-students and parents sued to challenge constitutionality under Establishment Clause of prayer during public high school graduation ceremony, while intervenor-students argued that prohibition of prayer would violate speech and free exercise rights); *Doe v. Small*, 726 F. Supp. 713, 714 (N.D. Ill. 1989) (plaintiffs sued to enjoin city from displaying religious paintings in a public park, while private organization intervened to assert free speech rights of private parties to display religious paintings without public funds or city endorsement in a public forum), *rev'd*, 964 F.2d 611 (7th Cir. 1992) (en banc); *Americans United For Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1541 (6th Cir. 1992) (en banc) (plaintiffs challenged grant of permit to religious organization to place a private menorah in a public square, while religious organization intervened to assert free speech right to place menorah in a public forum); *Forest Hills Early Learning Ctr., Inc. v. Lukhard*, 661 F. Supp. 300, 306 (E.D. Va. 1987) (non-religious day care centers challenged state regulations exempting church-run child care centers from licensing requirements as a violation of the Establishment Clause, while religiously-affiliated centers intervened and asserted that application of state licensing requirements would violate their right to free exercise of religion), *rev'd*, 846 F.2d 260 (4th Cir. 1988) (addressing only Establishment Clause issue); *Bollenbach v. Bd. of Educ.*, 659 F. Supp.

two separate judicial participations, being coded both in the Free Exercise/Accommodation set and the Establishment Clause set.

*d. Multiple Decisions by the Same Court in Case History*

On some occasions, the very same piece of litigation led to multiple published decisions being issued at the same court level. Should each such decision be recorded as another judicial participation or would this amount to double-counting? As with many things in life, the answer depends on the circumstances. So the following rules were established for coding these decisions:

For district court rulings issued before the first appeal, the first ruling on the merits of the case, as defined above, was counted as a judicial participation and subsequent rulings confirming or extending that ruling were excluded. However, if the additional district court ruling occurred after an intervening appeal, the district court decision after remand was counted as another judicial participation. When a case was remanded to the district court for further consideration after reversal or vacation (in whole or part) by the court of appeals, it returned to the district court in a different stage or status with new parameters that called for further exercise of judgment (at least when the decision after remand was again thought worthy of publication).

For the courts of appeals, multiple decisions in the same case fell into three categories, each justifying a different coding treatment. First, if the court of appeals issued a published opinion and then subsequently amended that opinion to include additional analysis but without changing the result (as was true in every instance of subsequent revision of an opinion that we found), the amended opinion was treated as the sole judicial participation but the date of the earlier ruling was adopted as the point in time at which the outcome had been fixed. Second, if a three-judge panel of a court of appeals issued a published decision that was subsequently reheard before all members of the court en banc, the panel opinion was excluded and the en banc opinion was treated as the sole judicial participation by each of the judges of the court. Indeed, had we recorded both the panel opinion and the en banc opinion, the judges participating on both would have been double-counted for a single judicial disposition. Third, if a case returned to the court of appeals on a second appeal after disposition by the district court on remand, the second appeal was treated as another judicial participation;

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1450 (S.D.N.Y. 1987) (female bus drivers employed by school district challenged deployment of only male bus drivers on certain routes to carry male children of Jewish religious sect to private religious school as having the primary effect of advancing religious beliefs in violation of the Establishment Clause, while private religious school and its male students as non-governmental third-party defendants asserted a free exercise claim against being required to ride with female drivers in violation of their religious mandates or not accept district busing program).

indeed, such appeals ordinarily are randomly assigned to a new court of appeals panel of judges in any event.<sup>234</sup>

The final database including both sets of decisions consists of 1484 judicial participations (that is, 1484 times in which an individual judge participated in the resolution of a religious freedom dispute), which are drawn from 729 published decisions. These represent 1103 judicial participations at the appellate court level, and 381 judicial participations at the trial court level. The set of Free Exercise Clause (and related) decisions consists of 1198 judicial participations from 586 decisions, in which Free Exercise Clause claims were successful 35.6% of the time. The set of Establishment Clause decisions consists of 286 judicial participations from 143 decisions, in which Establishment Clause claims were successful 42.3% of the time. A total of 537 judges participated in decisions included in this decision set, of whom 308 were district judges and 230 were court of appeals judges (three judges were on the district court for at least one decision during our study time period and had been elevated to the court of appeals for at least one other decision); two judges are from the Court of International Trade (sitting by designation on a court of appeals). The judges hailed from 79 of the nation's 94 district courts and from all twelve of the nation's regional federal circuit courts of appeals, as well as from the United States Court of Appeals for the Federal Circuit and the Court of International Trade.

### C. Regression Analysis

Because we analyzed the influences of multiple variables, a multiple regression model was necessary. Within the array of appropriate regression models, we settled on logistic regression. A logistical regression was appropriate given the dichotomous dependent variable.<sup>235</sup>

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<sup>234</sup> See SONGER, SHEEHAN & HAIRE, *supra* note 35, at 8 (stating that the general practice is "for the clerk to assign members to [federal court of appeals] panels randomly").

<sup>235</sup> All of our dependent variables in each model are dichotomous, coded for "1" if the judge participating in that observation ruled a particular way, "0" if not, and, as such, the usual linear regression models, such as Ordinary Least Squares (OLS), are not appropriate. OLS models, for example, allow the predicted values to fall outside the 0 to 1 range of our dependent variable. Moreover, OLS is relatively more inefficient as the error cannot be normally distributed nor can it have constant variance. For a fuller discussion of these points, see JOHN FOX, *APPLIED REGRESSION ANALYSES, LINEAR MODELS, AND RELATED METHODS* 443-92 (1997); MICHAEL O. FINKELSTEIN & BRUCE LEVIN, *STATISTICS FOR LAWYERS* 447-52 (1990).

In contrast to OLS models, logit and probit models deal quite well with a dichotomous dependent variable and either model is generally appropriate. We settled on a logit model for two reasons. First, logit models possess the practical advantages of relative ease and interpretability. FOX, *supra*, at 444-46. Second, the weight of the empirical literature favors logit models. See, e.g., Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1185 n.155 (1991); Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack*

Along with a statistical model, we also needed to generate sets of independent variables (as described in detail above and below). In addition to the issues discussed above, multicollinearity influenced our selection of the variables used within each variable set. We could not, of course, include variables that were highly collinear.<sup>236</sup>

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*of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1121 n.129 (1992).

In logistic regression, the dependent variable is the natural log of the odds ratio of the probability that an event, P, occurs to the probability that it does not occur [ $L = \log[p/(1-p)]$ ]. For more on logistic regression models, see generally ERIC A. HANUSHEK & JOHN E. JACKSON, STATISTICAL METHODS FOR SOCIAL SCIENTISTS 179–216 (1977); ALFRED DEMARIS, LOGIT MODELING: PRACTICAL APPLICATIONS (1992); JOHN H. ALDRICH & FORREST D. NELSON, LINEAR PROBABILITY, LOGIT, AND PROBIT MODELS (1984). Although logit and probit models both transform the actual proportion responding on the independent variables, probit models do so by replacing the observed proportions with the value of the standard normal curve below which the observed proportion of the area is located.

<sup>236</sup> Standard statistical checks suggest that none of our variables created multicollinearity problems. For a discussion of multicollinearity, see William D. Berry, Understanding Regression Assumptions 24–27 (Quantitative Applications in the Social Sciences, Series Paper No. 92, 1993). The presence of multicollinearity can be detected by a variety of techniques. See, e.g., David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner, & Barbara Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1690 n.132 (1998) (discussing alternative methods). We settled on the maximum variance inflation score (VIF) which is generated by an option in the SPSS regression command. None of the independent variable's VIF scores exceeded 5.00, the value that most conservative statisticians use to detect problems associated with multicollinearity. See David Jacobs & Jason T. Carmichael, *The Political Sociology of the Death Penalty: A Pooled Time-Series Analysis*, 67 AM. SOC. REV. 109, 121–22 n.12 (2002); see also John Fox, Regression Diagnostics 10–13 tbl. 3.1 (Quantitative Applications in the Social Sciences, Series Paper No. 79, 1991) (arguing that VIF scores need to exceed anywhere from 5.0 to 10.0 before much damage is done to the precision of the estimate by multicollinearity).

In addition to our sensitivity to mathematical multicollinearity, we did not include in a single regression equation two variables that are either theoretically or common-sensibly designed to measure the same characteristic. To be sure, we did not ignore alternative variables. In an effort to be thorough we ran alternative models. For example, as discussed below, we generated alternative measures of a judge's racial identification—one variable for minority status and alternatively two variables for African-American and Asian-American/Latino (see *infra* Part V.A.3.b)—and also generated three alternative measures of a judge's ideology, based upon party-of-appointing president, dummy variables for each individual appointing president, and calculation of a common space ideology score (see *infra* Part V.B.1). Because these variables are alternative measures of the very same characteristic, we did not include them simultaneously in a single regression run.



#### IV. FREE EXERCISE/ACCOMMODATION AND ESTABLISHMENT DECISIONS: VARIABLES AND RESULTS

##### A. Free Exercise/Accommodation Decisions

##### 1. General Results

If the claimant succeeded on any significant claim,<sup>237</sup> then the judge's ruling was coded as "1" for the basic outcome dependent variable (FE-OUTCM). If the claimant failed on all significant claims, the FE-OUTCM dependent variable was coded as "0." On this basic Free Exercise/Accommodation outcome variable, with 1198 judicial participations, the claimant was successful in 35.6% or 427 of the observations. When we eliminated cases in which information on religious backgrounds of claimants was missing, our study included 969 judicial participations, in which the claimant was successful in 37.9% or 367 of the data points.

Table 5 reports the regression analysis for the Free Exercise/Accommodation model. The case-specific variables are further explained immediately below, while the judge-specific variables are further explained in Part V of this Article.

Table 5: Regression Analysis for the Free Exercise/Accommodation Decisions  
[FE-OUTC=1]

<i>Case Type:</i>	
Regulation	-.18 (.31)
Private Education	-.19 (.44)
Public Education	.10 (.33)
Expression	1.35** (.32)
Tax	-2.65* (1.05)
Prisoner	.39 (.25)
Employment (Gov.)	-.66 (.35)
Criminal	-1.90** (.64)
<i>Claimant Religion:</i>	
Catholic	-1.01** (.35)
Baptist	-1.69* (.77)
Jewish	.22 (.36)
Orthodox Jewish	-.56 (.32)
Muslim	-.35 (.26)
Native American	.02 (.32)
Other	.12 (.23)

<sup>237</sup> For further description of the coding of the outcome variables at the general and claim type levels, and in the context of cases raising multiple claims, see *supra* Part III.B.3.b.

<i>Religious Correlation Betw. Judge &amp; Claimant</i>	
Religious Correlation	.01 (.40)
<i>Supreme Court Precedent:</i>	
Post-Smith	.39* (.16)
<i>Judge Religion:</i>	
Catholic	.37 (.21)
Baptist	.41 (.35)
Other Christian	.74** (.27)
Jewish	.73** (.27)
Other	.37 (.42)
None	.19 (.36)
<i>Judge Sex and Race:</i>	
Sex	-.20 (.30)
African-American	.14 (.34)
Asian-Latino	.93 (.56)
<i>Judge Ideology or Attitude:</i>	
Party	-.02 (.19)
ABA-Above Qualified	.05 (.18)
ABA- Below Qualified	.01 (.30)
Seniority	.00 (.00)
<i>Judge Education:</i>	
College Prestige	-.01 (.01)
Elite Law School	.31 (.19)
<i>Judge Employ. Bkgd:</i>	
Military	-.30 (.18)
Government	.10 (.16)
State or Local Judge	-.34 (.18)
<i>Community Demographics:</i>	
Catholic-%	-.00 (.01)
Jewish-%	.03 (.02)
Adherence Rate	.02* (.01)
Religious Homogeneity	-.01 (.01)
(constant)	-1.40 (.86)
% predicted	66.5
pseudo R <sup>2</sup>	.14
N	969

\* p < .05; \*\* p < .01.

Perhaps the most notable findings, which are discussed further below, were that judges from Jewish and non-mainstream Christian backgrounds were significantly more likely to approve claims for accommodation,<sup>238</sup> while claimants from Catholic and Baptist religious communities were significantly less likely to succeed.<sup>239</sup>

In addition to a general outcome for all types of claims included within the Free Exercise/Accommodation set of decisions,<sup>240</sup> we coded each of these judicial participations for the particular type of legal claim made, namely: pure Free Exercise Clause claims; statutory Religious Freedom Restoration Act (RFRA) claims; claims invoking the Free Speech Clause of the First Amendment; statutory Equal Access Act (EAA) claims; claims alleging unequal treatment or discrimination by the government; and subsidiary Establishment Clause claims by those seeking accommodation. Accordingly, we were able to perform regression runs using alternative dependent variables, thus allowing us to isolate certain observations for separate exploration and to ensure that our standard model did not contain distorting elements.<sup>241</sup>

For example, we conducted a focused regression run in which we limited the cases included to pure constitutional Free Exercise Clause claims, that is, those in which the claimant relied directly upon this constitutional clause, thus excluding all other theories or claims for religious accommodation that relied upon other constitutional or statutory provisions. The results remained remarkably stable and comparable to those obtained from the full set of cases in the Free Exercise/Accommodation decision set, thus increasing our confidence in the use of that standard model. Perhaps the most significant change in result when we isolated pure Free Exercise Clause claims (a total of 724 judicial participations) for separate analysis was that our dummy variable for decisions rendered after *Employment Division v. Smith*<sup>242</sup> ceased to be significant, a result discussed further below.<sup>243</sup>

As another example, which is also discussed further below,<sup>244</sup> when claims raising equal treatment or allegations of discrimination were examined in isolation (188 judicial participations), the racial background of the judge became a significant positive influence, the judge's former position as a state or local judge

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<sup>238</sup> See *infra* Part V.A.1; *supra* Tbl. 5.

<sup>239</sup> See *infra* Part IV.A.3; *supra* Tbl. 5.

<sup>240</sup> For a complete description of the claims included within the Free Exercise/Accommodation decision set, see *supra* Part III.B.1.

<sup>241</sup> These ancillary and focused regression runs are not reported with tables in this Article, but the results are available from the authors.

<sup>242</sup> 494 U.S. 872 (1990).

<sup>243</sup> See *infra* Parts III.A.3, IV.A.4.

<sup>244</sup> See *infra* Part V.A.3.b.

became a significant negative influence, and a claimant's Muslim religious affiliation became a significant negative influence.

In addition, we also coded each instance (158 judicial participations) in which the government responded to a Free Exercise Clause claim with an Establishment Clause defense—that is, as a shield against an affirmative claim—and the court addressed that defense on the merits. An interesting and not surprising result emerges from this analysis: the government's assertion of an Establishment Clause justification for refusing to accommodate a religious claimant's request was significantly more likely (at the 95% probability level) to be sustained if the case arose in the context of public education.<sup>245</sup> Judges thus appeared to be concerned about whether formal accommodation of a religious practice or expression in public schools might be regarded as an official imprimatur contrary to the command of the Establishment Clause, perhaps because of the perceived impressionability of children who may not be able to distinguish between governmental tolerance and governmental approval.<sup>246</sup>

## 2. Case Types

Each Free Exercise/Accommodation case was coded according to its case type, defined in terms of the factual elements of the case or its subject matter. Not only did we use these case-type variables as selection variables to analyze certain types of cases in isolation for focused regression runs, but the inclusion of these case-type factors served as control variables, that is, to ensure that any correlation discovered between religious or other variables and the dependent variable is not an "artifact" of some correlation between these variables and a particular type of case.<sup>247</sup> As Donald Songer and Susan Tabrizi explain, "integrated models will be incompletely specified unless they include the particular case facts that are most relevant for the type of cases examined."<sup>248</sup>

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<sup>245</sup> The regression analysis also indicated that the government Establishment Clause defense was significantly more likely to be successful in claims by followers of Native American religions, but given that this was based on only three judicial participations, the result is not reliable.

<sup>246</sup> THOMAS C. BERG, *THE STATE AND RELIGION IN A NUTSHELL* 150–51 (1998) (discussing the heightened concern shown by the Supreme Court about religious influences in the elementary and secondary public schools due in part to "the fact that children are especially susceptible to pressure from authority figures such as teachers and principals").

<sup>247</sup> Songer & Tabrizi, *supra* note 7, at 517 (explaining that, in a study of evangelical Christian judges and rulings in death penalty, gender discrimination, and obscenity cases, "[t]he case facts employed in each model below are primarily viewed as control variables to insure that any associations discovered between religion and judicial decisions are not an artifact of some correlation between particular types of cases and the concentration of particular religions in regions giving rise to those types of cases").

<sup>248</sup> *Id.* at 511.

After collapsing together certain categories by reason of small cell counts, this coding was used to create the following nine case type dummy variables:

**REGULATION:** Cases involving health, safety, or other regulation of private activity (including licensing), other than regulation of educational activities, accounted for 8.3% (or 100) of the 1198 observations in free exercise cases.

**PRIVATE EDUCATION:** Cases involving regulation of private education, at the elementary, secondary, or higher education level, thus excluding any cases involving regulation that was not directed at educational matters or selection of instructors, accounted for 3.5% (or 42) of the judicial participations.

**PUBLIC EDUCATION:** Cases involving public education, at the elementary, secondary, or higher education levels, including issues involving instruction and religious meetings or distribution of literature in schools by students, accounted for 7.3% (or 88) of the observations.

**EXPRESSION:** Cases involving religious expression or solicitation (other than in school), including religious expression on public property, accounted for 12.5% (or 150) of the observations.

**TAX:** Cases involving religious claims to exemption from, or other special treatment in matters of, taxation, including questions of charitable deductions and required contributions to Social Security or other public fund systems, accounted for 4.0% (or 48) of the observations.

**PRISONER:** Cases involving free exercise of religion claims by convicted criminals incarcerated in state or federal correctional facilities, that is, claims involving prison rules that affect religious practice and not challenges to the underlying criminal conviction, accounted for 37.3% (or 447) of the observations.

**EMPLOYMENT (GOVERNMENT):** Cases involving claims of discrimination in employment by government employers on the basis of religion accounted for 7.5% (or 90) of the observations.

**CRIMINAL:** Cases involving religious defenses raised to charges of criminal misconduct (other than in matters covered by the other categories, such as tax or regulation of private activity) accounted for 4.4% (or 53) of the observations.

OTHER: Other cases raising free exercise of religion claims accounted for 15.0% (or 180) of the observations; these observations included, among other matters, requests by non-students to hold religious meetings in public schools (2.5% or 30 observations), zoning or other property disputes (3.0% or 36 observations), and claims for government benefits (1.0% or 12 cases).

We selected OTHER as the reference variable, as it appeared to be the most general category and thus the one against which other types of cases could be most profitably compared.

If none of these case-type variables had proven to be significant, that negative finding would have suggested an error in selecting the appropriate control variables. For the same reason, that three of the eight case-type variables—Expression, Tax, and Criminal—included in the regression runs (the ninth being omitted as the reference variable) were statistically significant is hardly surprising;<sup>249</sup> two other case-type variables—Employment (Government) and Prisoner—emerged with sufficient consistency in focused regression runs to deserve general mention here.

That claims for exemption from the tax burdens imposed upon other citizens (significant in the negative direction at the 95% probability level) and from general criminal prohibitions on behavior (significant in the negative direction at the 99% probability level) were negatively associated with the dependent variable, that is, less likely to be successful, might be expected. Similarly, that cases in which the issue was expression of religious speech proved more likely to fall into the successful outcome category (significant in the positive direction at the 99% probability level) also comports with the hypothesis. As discussed further below,<sup>250</sup> after the Supreme Court's decision in *Employment Division v. Smith*<sup>251</sup> largely eliminated the Free Exercise Clause as a basis for challenging the impact of general laws on religious practices, a claimant would have been well-advised to reformulate a claim to include an assertion of a violation of freedom of speech.

In addition, the control variable for government employment disputes fell just outside of significance on the standard model (significant in the negative direction above the 94% probability level), and was significant in various focused or ancillary regression runs (such as those including only appellate judges and those in which prisoner and tax cases were excluded). Thus, in at least some permutations, claims of religious discrimination by government employers were significantly less likely to succeed, which might be explained either by a general judicial skepticism toward employment claims or by a more specific resistance to claims by public employees that their religious beliefs or practices justified

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<sup>249</sup> See *supra* Tbl. 5.

<sup>250</sup> See *infra* Part IV.A.4.

<sup>251</sup> 494 U.S. 872 (1990).

demands for special treatment or excused conduct that had resulted in an adverse personnel action.

Claims involving convicted criminals serving time in prison deserve special consideration on several levels. First, when we formulated our models before coding the opinions, we were concerned that inclusion of prisoner claims might distort the outcome because we hypothesized that antipathy to demands by prisoners for accommodation or special treatment on account of religion would result in a significantly lower success rate. Within the context of the published opinions in our study, that proved simply not to be the case. In fact, while 35.6% of Free Exercise/Accommodation claimants prevailed overall, the success rate among prisoners on such claims was 40.2%—a difference in outcome rate (based upon several cross-tab statistical tests) that was not significant. Moreover, when we conducted a focused regression run that excluded all prisoner cases, the results remained remarkably similar to the general model, confirming that inclusion of prisoner cases within our model was appropriate and did not have a destabilizing effect. Second, when we conducted an alternative regression run limited to cases in which pure constitutional Free Exercise Clause claims were raised, the control variable for prisoner cases emerged as significant—and positive—at above the 95% probability level. In sum, the general judicial response to claims by prisoners, at least those that are reported in published opinions, was not measurably more hostile.

Finally, cases arising in private or public education—which accounted for 109 of the judicial participations here—generated six interesting findings. First, as discussed further below,<sup>252</sup> Catholic judges were significantly more likely (at the 95% probability level) to respond favorably to religious claimants seeking exemption from school rules or policies or accommodation by school authorities of their religious beliefs and practices. Second, while Catholic claimants overall fared significantly less well in seeking religious accommodation, Catholic claimants were significantly more likely (at the 95% probability level) to succeed when their claims were raised in an educational context. Third, as also discussed further below,<sup>253</sup> judges appointed by Republican Presidents or who scored as more conservative on an ideology measure were more receptive to free exercise claims in the educational context. Fourth, as noted above,<sup>254</sup> government defensive arguments that a particular type of accommodation would infringe on the Establishment Clause were more likely to succeed when the setting was a public education institution. Fifth, when free speech claims were analyzed in isolation, religious expression claims were significantly less likely to be accepted in public schools (proving to be significant in a negative direction at the 99%

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<sup>252</sup> See *infra* Part V.A.1.

<sup>253</sup> See *infra* Part V.B.1.

<sup>254</sup> See *supra* Part IV.A.1.

probability level). Sixth, as also discussed later,<sup>255</sup> judges who attended more prestigious undergraduate institutions were significantly less likely (at the 95% probability level) to approve of claims for exemption from educational rules or regulations.

### 3. *Religious Affiliation of Claimants*

The religious affiliation of the claimant in each case was identified, where possible, for two primary purposes. First, determining the religious beliefs of the claimant allows us to explore whether judges are more or less receptive to the petitions of those from certain religious groups. In addition, as addressed later,<sup>256</sup> we can measure whether judges appear to be more empathetic toward those who share their own religious sentiments. Second, this data is relevant for analyzing whether certain religious communities, particularly those that fall outside of the mainstream of American religious life, are less likely to prevail in seeking accommodation from the larger society. However, because we have not included unpublished decisions in our study,<sup>257</sup> we have not mapped the entire topography in terms of judicial responses to claims for religious accommodation. Still, the presence or absence of patterns of success and failure in the published opinions is noteworthy, as it indicates judicial reaction to claims from particular religious communities in recorded decisions highlighted by publication.

In identifying religious affiliation, we of course understand, as we discuss at greater length below with respect to the religious background of the judges themselves,<sup>258</sup> that an individual's revelation of a religious label may or may not reflect that the religion is an important aspect of the person's life or has any effect on the person's thinking or behavior. Fortunately, any concern about the significance of religion to the claimants is eliminated by the nature of the cases included in our study. We assumed that a person for whom a religious principle is of such importance as to warrant litigation to defend it is rather likely to be a person of meaningful religious convictions (although, of course, cases in which people attempt to avoid legal responsibility may attract insincere claimants).<sup>259</sup> Moreover, since our concern is with how variables such as the claimant's

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<sup>255</sup> See *infra* Part V.A.4.

<sup>256</sup> See *infra* Part V.A.1.

<sup>257</sup> For a discussion of the decision to use published decisions in this study and the qualifications arising therefrom, see *supra* Part III.A.2.

<sup>258</sup> See *infra* Part V.A.1.

<sup>259</sup> See Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 325-26 (1986) (discussing the problem of "strategic claims of religious scruples" and noting that "the likelihood of fraudulent claims will turn on whether more may be lost by following the religious mandate at issue than may be gained by avoiding the legal provision in question").



religious affiliation influence judicial decisionmaking, the most salient feature is the appearance of religious affiliation to the observer.

Religious affiliations of claimants were coded as follows (if more than one claimant from more than one religious persuasion were involved, which rarely occurred in the cases in our study, the affiliation of the lead claimant was coded). We began coding the claimant's religious affiliation variable at the most specific level possible by denomination and sect, although anticipating that due to small numbers in some religious affiliations it would become necessary to combine them into more general categories later. Based upon cell counts, we ultimately gathered the religious affiliations for claimants into eight general categories, for which dummy variables were created:

**CATHOLIC:** Catholic claimants accounted for 6.3% (or 75) of the 1198 observations in Free Exercise/Accommodation cases.

**BAPTIST:** Baptist claimants accounted for 3.0% (or 36) of these observations.

**GENERAL CHRISTIAN:** Claimants who were affiliated with other Christian denominations or sects accounted for a total of 25.2% (or 302) of the observations in the free exercise decision set. Of these, 1.7% (or 20) involved claimants who were identified as Mainline Protestant; 16.5% (or 198) involved claimants who could be identified only as other Christian, that is, not Mainline Protestant nor Catholic; 1.9% (or 23) involved Pentecostal Christians; 2.3% (or 27) involved Seventh-Day Adventists; 1.1% (or 13) involved self-identified Fundamentalist Christians; 0.5% (or 6 observations) involved claimants who were Eastern Orthodox; 0.7% (or 8) involved Quaker claimants; and 0.6% (or 7) involved claimants affiliated with Amish or Mennonite churches.

**ORTHODOX JEWISH:** Orthodox or Conservative Jews accounted for 7.2% (or 86) of the observations in Free Exercise/Accommodation cases.

**JEWISH:** Other Jewish claimants accounted for 4.2% (or 50) of the judicial participations in the Free Exercise/Accommodation set of decisions.

**MUSLIM:** Muslim claimants accounted for 14.5% (or 174) of the judicial participations in the Free Exercise/Accommodation set.

**NATIVE AMERICAN:** Claimants who followed Native American religious practices accounted for 5.7% (or 68) of the observations.

**OTHER:** Claimants with other religious affiliations accounted for 14.9% (or 178) of the observations. Of these, 0.3% (or 3) were Unitarian; 0.7% (or 8) were Mormon; 0.7% (or 8) were Jehovah's Witnesses; 0.3% (or 3) were

Christian Scientist; 1.6% (or 19) were white separatists; and 11.4% (or 137) were divided among a large array of other religions not falling within the categories of Christian, Jewish, Muslim, or Native American.

Claimants for whom a religious affiliation could not be determined accounted for 19.1% (or 229) of the 1198 observations in the Free Exercise/Accommodation set of decisions. Accordingly, we were forced to treat these observations as missing in models that included the claimant religious affiliation dummy variables; these judicial participations were restored in regression runs involving the theoretical models<sup>260</sup> which did not include case-specific independent variables.

While no obvious candidate springs forth as the appropriate reference variable, we selected GENERAL CHRISTIAN as the variable that best appeared to occupy the broad span of the religious spectrum. This General Christian variable collects together various non-Catholic and non-Baptist Christian adherents and thus is the one that is most broad and inclusive.

In our study of the free exercise set of cases, two categories of religious affiliation by claimants emerged as consistently and significantly associated with a negative outcome—Catholic (at the 99% probability level) and Baptist (at the 95% probability level).<sup>261</sup>

For some readers, this result may seem counter-intuitive:<sup>262</sup> that those whose religious views are reasonably close to the mainstream of American society are significantly less likely to succeed in obtaining a court-ordered accommodation of religious practices, while those adhering to distinctly minority religions (with the possible exception of Muslims as discussed next) do not encounter similarly negative responses. One possible explanation for this result may be that the very fact of near-mainstream status works against a successful request for accommodation. Because Catholics and Baptists are found in significant numbers across the country, judges may consciously or unconsciously conclude that followers of those religious traditions are capable of effectively participating in the political process and thus are neither in need nor deserving of protection through judicial intervention from the results of that political process.

Another possible explanation is that members of the Catholic Church and Baptist fellowships come into court struggling against negative perceptions and attitudes shared by political and legal elites. To begin with, as several scholars have documented in recent years, the evolution of church-state doctrine in the courts historically was substantially influenced by cultural prejudices against the

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<sup>260</sup> See *supra* Part II.

<sup>261</sup> See *supra* Tbl. 5.

<sup>262</sup> See Feldman, *supra* note 101, at 252 (arguing that when “Christians do find themselves in court defending the exercise of their religion, the judiciary is likely to be receptive to their claims” because “Christian judges should be more likely to be sympathetic to the plight of fellow Christians”).

Catholic Church as an institution and Catholics as religious minorities in American society.<sup>263</sup> Indeed, in the not-too-distant past, members of the United States Supreme Court rather openly expressed anti-Catholic sentiments, assailing the Church and its followers as “sectarian religious propagandists” who were aggressively seeking to “indoctrinate [the Church’s] creed.”<sup>264</sup> Three years ago, in a plurality opinion for the Court,<sup>265</sup> Justice Clarence Thomas characterized hostility toward government aid to so-called “pervasively sectarian” private schools as having a “shameful pedigree” and observed that it originated during a period of “pervasive hostility to the Catholic Church and to Catholics in general.”<sup>266</sup> Although the general public perception of Catholics has improved in recent decades, it admittedly is possible that residual antipathy toward Catholicism may persist in the federal judiciary.

However, despite the sobering lessons of history, the skeptical judicial audience encountered by Catholic claimants in our study need not be understood in terms of anti-Catholic bigotry. Although “explicit dislike of Catholicism” remains an unfortunate element of the Church-State debate in some quarters,<sup>267</sup> we are reluctant to believe that such discriminatory attitudes may be found on the modern federal bench. Moreover, Baptist claimants faced the same up-hill climb in our study, which of course cannot be explained by the history of anti-Catholic feeling in the United States; indeed, Baptists historically have been on the other side of the Catholic-Protestant religious divide on matters of Church and State.<sup>268</sup>

Rather, we suggest that the phenomenon of impaired success for claimants from these two religious communities may better be understood as part of what Thomas Berg describes as “a broader distrust of politically active social conservatives,” which now includes both Catholics and evangelical Protestants.<sup>269</sup> The pertinent legal or political “division is no longer between Catholics and everyone else,” but rather is a general cultural divide between traditionalists and progressives.<sup>270</sup> What Catholics and evangelical Protestants,

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<sup>263</sup> See generally PHILIP HAMBURGER, *SEPARATION OF CHURCH & STATE passim* (2002) (see index listing for “Anti-Catholicism”); Berg, *supra* note 153, *passim*; John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 282, 359 (2001); Laycock, *supra* note 50, at 50–53, 57–58.

<sup>264</sup> Berg, *supra* note 153, at 129 (quoting anti-Catholic comments by Justices Black and Douglas, as well as others).

<sup>265</sup> *Mitchell v. Helms*, 530 U.S. 793 (2000).

<sup>266</sup> *Id.* at 828 (Thomas, J., plurality opinion); see also Gerard V. Bradley, *An Unconstitutional Stereotype: Catholic Schools as “Pervasively Sectarian,”* 7 TEX. REV. L. & POL. 1, 3 (2002) (arguing that “the ‘pervasively sectarian’ theory presents an unconstitutional stereotype of Catholic belief and practice”).

<sup>267</sup> Berg, *supra* note 153, at 168.

<sup>268</sup> HAMBURGER, *supra* note 263, at 376–78.

<sup>269</sup> Berg, *supra* note 153, at 123.

<sup>270</sup> *Id.* at 169; see also JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO*

such as those identified as Baptists in our study,<sup>271</sup> tend to hold in common today is a general adherence to traditional or conservative social values and moral principles, which may conflict with the commands and policy-initiatives of secular and liberal government. Thus, when traditionalist Catholics and Baptists resist governmental regulation of private conduct by seeking court-ordered exemptions from, for example, anti-discrimination or licensing laws, they run against the grain of mainstream secular society, particularly in metropolitan localities.

While Baptists have not recently suffered overt discrimination to the degree faced by Catholics of earlier generations, conservative Baptists are a visible element of the so-called Religious Right, whose perspective on legal and political matters parallels that of orthodox Catholics and contrasts with that of the Mainline Protestant worldview. Although the numbers of Mainline Protestant churchgoers have significantly declined in recent years, in part at the expense of the growing evangelical denominations,<sup>272</sup> more of the federal judges in our study identify with mainline churches (representing more than 37% of the judicial participations) than with any other single religious grouping.

Finally, Muslim claimants as well may be significantly disadvantaged in asserting Free Exercise/Accommodation claims. While the Muslim claimant variable was significant at only the 83% probability level under our standard model, it rose to significance at the 99% probability level when both district court decisions and court of appeals decisions were evaluated separately in ancillary regression runs. Because these ancillary runs were conducted primarily for cross-checking purposes, we are reluctant to rely on them for findings. Still, although it is odd that this variable descends to a lower level of significance when those two sets of decisions are joined for combined regression analysis, the fact that appellate court decisions and district court decisions separately both are negatively and quite significantly correlated with claims by Muslims suggests that something measurable may be present here. Moreover, when cases involving claims of unequal treatment or discrimination were evaluated separately in a focused regression run of 188 judicial participations, Muslim claimants proved significantly less likely to succeed (at the 95% probability level). Therefore, at least pending further study, there is some evidence that adherents to Islam,

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DEFINE AMERICA 42–51 (1991) (describing “culture war” between traditionalists and progressives in American society). For further discussion of the traditionalist versus progressive or modernist division in terms of its application to the religious affiliation of judges, see *infra* Part V.A.1.

<sup>271</sup> While there always has a liberal wing of the Baptist movement, claimants and judges belonging to the American Baptist Church were separately classified in our study as Mainline Protestants, while the claimants coded as Baptists for our study fell into the fundamentalist or evangelical categories.

<sup>272</sup> Berg, *supra* note 153, at 126; Jeffries & Ryan, *supra* note 263, at 340–58.

apparently alone among the non-Christian religious faiths, may encounter greater resistance in pressing claims for religious accommodation in federal courts.

#### 4. *Decisions Before and After Employment Division v. Smith*

On April 17, 1990—a little less than half-way through the time range for our study—the Supreme Court issued its landmark decision in *Employment Division v. Smith*.<sup>273</sup> The *Smith* decision removed the requirement under prior precedent that government establish a compelling public interest to justify application of laws in a manner that substantially burdens a religious practice.<sup>274</sup> Under *Smith*, a law of general application that is neutral in purpose will be upheld notwithstanding the severity of impact on the sincere practice of religious faith.<sup>275</sup> Accordingly, one would expect that successful claims for religious accommodation would fall off dramatically after the *Smith* decision.

Indeed, a prior study by Professor James Brent, that focused directly and exclusively upon the effect of *Smith*, found that the federal courts of appeals “became significantly less receptive to free exercise claims following the *Smith* decision.”<sup>276</sup> However, that same study discovered that after the passage of the Religious Freedom Restoration Act (RFRA)<sup>277</sup> in 1993, “the winning percentage of free exercise claimants rose again” to the same level as before *Smith*.<sup>278</sup>

In our study, as the SMITH control variable, decisions were coded as either coming before (“0”) or after (“1”) April 17, 1990 to permit comparison between decisions dating before and after the Supreme Court’s *Smith* decision. While this variable did prove significant (at the 95 to 99% probability level, depending on the set of variables), the direction of influence is contrary to initial expectation—decisions rendered after *Smith* were more likely to *uphold* claims for religious accommodation (Table 5). Indeed, while claimants in the general set of decisions for the Free Exercise/Accommodation model were successful in only 30.0% of observations issued before *Smith*, the success rate rose to 39.7% after *Smith*. Cross-tab statistical measures confirm that this difference in success rate is significant and not likely to be a product of random chance.

What then may account for what at first glance may appear to be a different result obtained in the Brent study as compared with ours? To begin with, the findings of the two studies may not directly conflict but rather reflect different

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<sup>273</sup> 494 U.S. 872 (1990).

<sup>274</sup> *Id.* at 882–89.

<sup>275</sup> *See id.* at 878–82.

<sup>276</sup> James C. Brent, *An Agent and Two Principals: U.S. Court of Appeals Responses to Employment Division, Department of Human Resources v. Smith and the Religious Freedom Restoration Act*, 27 AM. POL. Q. 236, 254 (1999).

<sup>277</sup> 42 U.S.C. §§ 2000bb to 2000bb-4 (2000).

<sup>278</sup> Brent, *supra* note 276, at 250.

nuances and inherent limitations in each study. Brent's study accounted for two different time periods following *Smith*, with markedly different margins of success for free exercise claimants.<sup>279</sup> Brent separately analyzed decision patterns for the three-and-a-half-year-period between *Smith* and the passage of RFRA (during which the winning rate for free exercise claimants in the courts of appeals plummeted) and the three-year period following the enactment of RFRA (during which the success rate for free exercise claimants returned to pre-*Smith* levels).<sup>280</sup> By contrast, our study reported the success rate overall of claimants during a four-and-a-half-year period after *Smith*, without separately evaluating the impact of the enactment of RFRA during that time frame. Thus, the initial decline and subsequent revival of free exercise claims as found by Brent may have been submerged in our undifferentiated results from the overall time period.

Moreover, as discussed earlier,<sup>281</sup> when we conducted a focused study upon only Free Exercise Clause claims (which were the heart of Brent's study), thus excluding other theories or claims for religious accommodation based upon other constitutional or statutory grounds, our dummy variable for post-*Smith* decisions ceased to be statistically significant. Thus, our results in cases raising clearly-defined Free Exercise Clause claims fall largely into line with Brent's finding that, without separately accounting for the post-*Smith* but pre-RFRA period, the aggregate success rate on such claims before *Smith* (31.8%) and after *Smith* (32.1%) were nearly identical.<sup>282</sup> In sum, when the data is closely examined, our results are consistent with Brent's.

Nonetheless, Brent's study may be more reliable here, both because of its singular focus on the *Smith* effect question (whereas the primary center of attention in our study is on influences upon religious liberty decisions generally) and because Brent included unpublished as well as published decisions of the courts of appeals in his data set.<sup>283</sup> As we noted earlier,<sup>284</sup> given the principal concern of our study with what influences or motivates a judge in evaluating religious liberty claims, decisions that were designated for public publication as precedential were well-suited for our research purpose. However, as we also acknowledged,<sup>285</sup> when a study examines the development or effect of a change in legal doctrine in the courts—what Brent refers to as “judicial impact research”<sup>286</sup>—the entire universe of pertinent cases, published and unpublished, ideally would be examined for a more complete picture of trends in outcome.

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<sup>279</sup> *Id.* at 246.

<sup>280</sup> *Id.*

<sup>281</sup> See *supra* Part IV.A.1, Tbl. 5.

<sup>282</sup> Brent, *supra* note 276, at 250.

<sup>283</sup> *Id.* at 249.

<sup>284</sup> See *supra* Part III.A.2.

<sup>285</sup> *Id.*

<sup>286</sup> Brent, *supra* note 276, at 249.

At the same time, Brent's use of unpublished decisions from Lexis may not have been an unalloyed virtue, given that electronic databases have gradually been expanding the proportion of unpublished decisions that are collected. As we also discussed earlier,<sup>287</sup> inclusion of unpublished decisions could introduce a temporal bias, in that for example an unpublished decision from 1995 is much more likely to be included in Westlaw or Lexis than an unpublished decision from 1986. If we further hypothesize that a decision upholding a free exercise claim against a government is more likely to be published, then the higher mix of published decisions from the earlier period of study effectively may overstate the success rate of such claims at that time, thus concealing a significant comparative rise in the success of such claims during the later period after *Smith*. In sum, whatever choice a researcher makes about the use or non-use of unpublished decisions in this context carries with it some risks and attendant qualifications.

Still, our study as to the impact of *Smith* produces two results that are of interest and that we believe are reliable. First, our results provide some confirmation of Brent's finding that within some time period after *Smith*, perhaps attributable to the enactment of RFRA and perhaps not surviving beyond the fall of RFRA (which occurred outside the selected time period for both studies), the success rate for free exercise claimants climbed back at least to the pre-*Smith* level. Second, we uncovered evidence of a notable change in litigant strategy in religious liberty cases subsequent to *Smith*, the presence of which even among the stratum of published opinions likely signals the existence of a broader change, although the full measure of that change cannot be accurately estimated without examining unpublished decisions as well.

With respect to that evolution in litigant strategy, this change was foreshadowed (partially) in the *Smith* decision itself, as the Supreme Court while taking away much of the litigative potential of the Free Exercise Clause with one hand, offered meaningful alternative avenues for judicial recourse with the other hand. While the Free Exercise Clause standing alone may have been drained of much of its constitutional force by the *Smith* ruling, the Court allowed that when the clause is invoked "in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents . . . to direct the education of children,"<sup>288</sup> otherwise neutral and generally applicable laws still may fall before religiously-motivated action.<sup>289</sup> Accordingly, as Professor Douglas Laycock has observed, important "remnants" of the Free Exercise Clause remain available for judicial enforcement even after *Smith* in the form of heightened protection of "hybrid rights" to free exercise and free speech and to

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<sup>287</sup> See *supra* Part III.A.2.

<sup>288</sup> *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990) (citations omitted).

<sup>289</sup> See *id.* at 881–82.

free exercise and parental rights, as well as a basic requisite that legitimate laws be truly neutral and general in application.<sup>290</sup>

Looking closer at the data in our study, there are indications that precisely this kind of adaptation in theoretical strategy has occurred in religious liberty litigation. In other words, creative lawyers, having found the door closed, opened a window. As discussed earlier,<sup>291</sup> the case-type variable capturing cases involving disputes about religious expression was positively associated with a successful outcome (at the 99% probability level). Together with the Supreme Court's invitation in *Smith* to transform free exercise of religion cases into hybrid free speech cases, we would expect that the proportion of cases raising freedom of speech claims would rise substantially after *Smith*. And indeed that appears to have transpired. Before *Smith*, free speech arguments were raised in only 12.9% of the cases we studied that involved claims for religious accommodation, while the proportion of cases framed as involving expressive rights more than doubled to 28.7% after *Smith*. Again, using cross-tab statistical measures, this difference in claim presentation is statistically significant.

Somewhat surprisingly, Brent found that "litigants who raised multiple constitutional claims were not significantly more likely to win their cases than were litigants raising only a free exercise claim."<sup>292</sup> However, even if confirmed by further study, that does not directly undermine our finding either that attorneys for plaintiffs seeking religious accommodation changed strategy after *Smith* or our finding that such a change enhanced the likelihood of success. Brent's study looked only to the courts of appeals and searched primarily for cases in which the words "free exercise" appeared,<sup>293</sup> while our study considered published decisions from both the courts of appeals and the district courts and further defined religious liberty cases more broadly as including religious expression, statutory, and equality/anti-discrimination claims.<sup>294</sup> Brent's study thus looked beyond Free Exercise Clause claims only to those circumstances where another type of religious freedom claim was actually joined with that free exercise claim, that is, the classic attempt at a so-called "hybrid" claim. Along with Brent's findings, there is other evidence that the promise of the hybrid rights exception "to ameliorate the [*Smith*] decision's harsher aspects" has not been realized in the lower federal courts.<sup>295</sup>

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<sup>290</sup> Laycock, *supra* note 28, at 41.

<sup>291</sup> See *supra* Part IV.A.2.

<sup>292</sup> Brent, *supra* note 276, at 251.

<sup>293</sup> *Id.* at 246, 261–62 n.18.

<sup>294</sup> See *supra* Part III.A.1.

<sup>295</sup> Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the Oregon Employment Division v. Smith "Hybrid Rights Exception,"* 108 PENN. ST. L. REV. 573, 573–74 (2003) (finding that "hybrid rights claims have overwhelmingly failed to succeed" and describing criticism of the concept in the lower federal courts).



By contrast, our study considered not only multiple claim cases in which religious expression or religious discrimination claims were raised in addition to Free Exercise Clause claims, but also those cases in which litigants sought to bypass *Smith* altogether by eschewing any reliance on the Free Exercise Clause and instead couching a claim solely upon free speech or equality principles. Brent's study was not designed to fully capture this distinctly alternative presentation of religious liberty complaints. Our study suggests a marked growth in the number of religious expression and religious equality claims after *Smith*, sometimes attached to complaints invoking traditional free exercise theories and sometimes not, with a consequent rise in the success rate for religious liberty claims. This evolution in plaintiff strategy constitutes an important development in religious freedom litigation.

## B. Establishment Decisions

### 1. General Results

Turning then to the decision set of Establishment cases as defined earlier,<sup>296</sup> if the claimant succeeded on any significant claim challenging governmental action as violative of the Establishment Clause,<sup>297</sup> then the judge's ruling is coded as "1" for the basic outcome dependent variable (EC-OUTCM). If the claimant failed on all significant claims, the EC-OUTCM dependent variable is coded as "0." In the total of 286 judicial participations in cases involving Establishment Clause claims, the claimant succeeded in 42.3% (or 121) of the observations.

Table 6 reports the regression analysis for the Establishment model. The case-specific variables are further explained immediately below, while the judge-specific variables are further explained in Part V of this Article.

Table 6: Regression Analysis for the Establishment Decisions  
[EC-OUTCM=1]

<i>Case Type:</i>	
Religious Meetings	.72 (.63)
Private Education	-.31 (.64)
Public Education	.94* (.38)
Religious Symbols	1.22** (.38)
<i>Judge Religion:</i>	
Catholic	-.64 (.44)
Baptist	-.48 (.61)
Other Christian	.97 (.58)

<sup>296</sup> See *supra* Part III.B.2.

<sup>297</sup> For further description of the coding of the outcome variables at the general and claim type levels, in the context of cases raising multiple claims, see Part III.B.3.b.

Jewish	1.08* (.54)
Other	.78 (.102)
None	1.39 (.78)
<i>Judge Sex and Race:</i>	
Sex	-.64 (.66)
African-American	-.11 (.73)
Asian-Latino	2.07* (1.05)
<i>Judge Ideology or Attitude:</i>	
Party	-.78* (.34)
ABA-Above Qualified	.26 (.35)
ABA- Below Qualified	.82 (.53)
Seniority	.00 (.00)
<i>Judge Education:</i>	
College Prestige	-.02 (.02)
Elite Law School	.40 (.32)
<i>Judge Employ. Bkgd:</i>	
Military	.41 (.35)
Government	-.44 (.32)
State or Local Judge	-.40 (.32)
<i>Community Demographics:</i>	
Catholic-%	-.01 (.01)
Jewish-%	.08 (.05)
Adherence Rate	.03* (.02)
Religious Homogeneity	-.01 (.02)
(constant)	-1.42 (1.71)
% predicted	69.6
Pseudo R <sup>2</sup>	.18
N	286

\* p < .05; \*\* p < .01.

Among the more notable findings on the Establishment model, as discussed further below, Jewish judges<sup>298</sup> and Asian-American/Latino judges<sup>299</sup> (but not African-American judges) were significantly more likely to uphold Establishment Clause claims. While ideological variables were insignificant in nearly all other aspects of this study, two alternative measures of ideology emerged as significant under this model and in the direction predicted. Judges appointed by Republican Presidents<sup>300</sup> and those falling on the conservative side of an ideology

<sup>298</sup> See *infra* Part V.A.1.

<sup>299</sup> See *infra* Part V.A.3.

<sup>300</sup> See *infra* Part V.B.1.

measurement<sup>301</sup> were significantly less likely to sustain Establishment Clause challenges to governmental action.<sup>302</sup>

## 2. Case Types

As we had done with the Free Exercise/Accommodation set of decisions,<sup>303</sup> each Establishment Clause case also was coded according to its case type. These case type variables were used as selection variables to analyze certain types of cases in isolation for separate regression runs and also were employed as control variables.<sup>304</sup> After collapsing together certain categories by reason of small cell counts, that coding was used to create the following five case type dummy variables:

**PRIVATE EDUCATION:** Cases involving Establishment Clause challenges to government aid or involvement with private elementary, secondary, or higher education accounted for 7.0% (or 20) of the 286 observations in Establishment Clause cases.

**PUBLIC EDUCATION:** Cases involving Establishment Clause claims in the context of public elementary, secondary, or higher education, including issues of prayer in school or at school events, accounted for 27.6% (or 79) of these observations.

**RELIGIOUS MEETINGS ON PUBLIC PROPERTY:** Cases involving Establishment Clause challenges to religious meetings being held in or prayer being offered in public facilities accounted for 5.9% (or 17) of the observations.

**RELIGIOUS SYMBOLS:** Cases involving Establishment Clause challenges to the presence or installation of allegedly religious symbols on public property or associated with public entities (for example, the crèche cases, challenges to governmental logos, etc.) accounted for 29.7% (or 85) of the observations).

**OTHER:** Other cases involving Establishment Clause claims accounted for 29.7% (or 85) of the observations; these included challenges to taxpayer compensation of chaplains at public facilities, participation of religious entities in government welfare programs, or legislative exemptions for religious institutions from certain regulations or law.

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<sup>301</sup> See *infra* Part V.B.1.

<sup>302</sup> See *supra* Tbl. 6.

<sup>303</sup> See *supra* Part IV.A.2.

<sup>304</sup> For discussion of use of case facts as control variables, see *supra* Part IV.A.2.

We selected OTHER as the reference variable, as it appeared to be the most general category and the one against which other types of cases could be most profitably compared.

If none of these case-type variables had proven to be significant, that negative finding would have suggested an error in selecting the appropriate control variables. Thus, it was encouraging that two of the four case-type variables included in the run (with the fifth variable omitted as the reference) proved significant at the 99% probability level—Private Education and Religious Symbols.<sup>305</sup> Both of these control variables were also significant in the anticipated direction, that is, that an Establishment Clause challenge arising in the context of public education or the adoption of a religious symbol by a government or placement of a religious symbol on public property enhanced the likelihood that the challenge would be successful.

In addition, we also created these control variables to be able to select certain types of cases for separate analysis in focused regression runs.<sup>306</sup> When cases involving the adoption or acceptance by government of religious symbols, such as inclusion of religious icons on logos for municipalities or placement of religious objects on public property, were considered alone the significantly greater likelihood of a positive Establishment Clause ruling by Jewish judges and of a negative ruling by Republican-appointed or more conservative judges persisted. In addition, judges from non-mainstream Christian fellowships joined their Jewish brethren in being significantly more likely (at the 95% probability level) to uphold an Establishment Clause challenge to the adoption or placement of such religious symbols.

Looking separately at cases involving education, both public and private (which were combined for the focused regression run because the N count for private-only education cases was so low), one other interesting finding, again in the anticipated direction, appears. Catholic judges were significantly less likely (at the 95% probability level) to accept an Establishment Clause challenge raised in the context of education. Given the frequency and visibility of cases involving Catholic parochial schools in the historical Establishment Clause debate and that arguments for separation of Church and State often were framed in terms of excluding “sectarian” (a “code” word for Catholic) influences from public education and precluding support of “sectarian” institutions in private education, it is not at all surprising that Catholic judges would be least responsive to these claims.

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<sup>305</sup> See *supra* Tbl. 6.

<sup>306</sup> Although these regression runs are not reported in the tables accompanying this Article, they are available from the authors.

## V. JUDGE-SPECIFIC VARIABLES AND RESULTS

As the published decisions were coded and categorized, each individual judge involved in the judicial disposition was identified.<sup>307</sup> In addition to variables attendant to each of the coded decisions, which are discussed in detail above with associated findings,<sup>308</sup> background information for each judge and the judge's community was gathered and coded as independent variables.

In our prior empirical study of judicial decisionmaking in the context of district court rulings on the constitutionality of the new federal sentencing guidelines and its promulgating agency, the Sentencing Commission, in 1988, we outlined at length various independent variables worthy of study, divided into such general categories as judges' demographic variables, political variables, prior employment variables, judicial role or institutional variables, promotion potential, and precedent.<sup>309</sup> To mitigate the charge of data mining, we have retained here only those variables that are justified by a legitimate hypothetical basis or by salience in prior research. We have added two sets of variables involving the judge's religious affiliation (one on the judge's own religious background and one correlating the judge's religious background to the religious affiliation of the claimant in Free Exercise cases), one variable on the selectivity of a judge's undergraduate college, and four variables measuring the religious demographics of the community in which the judge maintains chambers (the Catholic percentage in the community, the Jewish percentage in the community, the total adherence rate to any religious group in a community, and a score for religious homogeneity in that community). Each of those variables is discussed further below in terms of the theory for including the variable, the manner in which the variable is measured, and the results of our study as to that variable.

We obtained background information on judges from several sources, including standard biographies on federal judges,<sup>310</sup> on-line databases,<sup>311</sup>

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<sup>307</sup> Because of certain data included in the study, most particularly common space ideology scores, which are available only since the Eisenhower Administration, judges appointed by Presidents Roosevelt and Truman were excluded from the study. This resulted in the exclusion of only two district court judges who had been appointed by Presidents Roosevelt and Truman and who participated by designation in three court of appeals decisions, thus excluding three judicial participations, reducing our total to 1484.

<sup>308</sup> See *supra* Part IV.

<sup>309</sup> Sisk, Heise & Morris, *supra* note 155, at 1417–30.

<sup>310</sup> See generally ALMANAC OF THE FEDERAL JUDICIARY, THE AMERICAN BENCH, BIOGRAPHICAL DIRECTORY OF THE FEDERAL JUDICIARY 1789–2000 (2001); WHO'S WHO IN AMERICAN LAW.

<sup>311</sup> In particular, we obtained valuable information from the "Multi-User Database on the Attributes of United States Appeals Court Judges, 1801–1994," compiled by Gary Zuk, Deborah J. Barrow, and Gerard S. Gyski, which is available at <http://www.icpsr.umich.edu:8080/ICPSR-STUDY/06796.xml> (last visited Feb. 22, 2004).

independent research into the records of Senate judicial confirmation hearings at the National Archives, an earlier survey of federal judges on certain subjects where the information was uncertain,<sup>312</sup> and, most especially, the generosity of many other scholars, as acknowledged below.

### A. Demographic and Educational Variables

#### 1. Religious Affiliation of Judge

Perhaps most importantly in the demographic category of variables, we have a number of religion-dimension variables, including the religious affiliation or background of the judge, a variable not included in our prior studies. As noted previously at numerous points and discussed further in detail here, the religious background of judges proved to be the single most prominent feature in this study.

Although religious origin or affiliation of judges historically “mirror[ed] the different religious composition of the two major political parties,”<sup>313</sup> religious origin largely has ceased to be a barrier or major factor in judicial selection.<sup>314</sup> While Democratic administrations in the past appointed more Catholics and Jews to judicial posts, that pattern largely disappeared with the Reagan Administration which also appointed a high percentage of Catholics and Jews to the federal bench.<sup>315</sup>

We began coding the judge’s religious affiliation variable at the most specific level possible by denomination and sect, although anticipating that due to small numbers in some religious affiliations it would become necessary combine them into more general categories later. Although we were able to achieve a somewhat greater diversity for our study than the traditional trilogy of Catholic, Protestant, and Jew used in most prior empirical studies of judges,<sup>316</sup> we nonetheless were forced to gather the judges into seven general categories, for which dummy variables were created:

CATHOLIC: Catholic judges accounted for 25.9% (or 385) of the 1484 total observations in our largest models.

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[hereinafter “Multi-User Database on Appeals Court Judges”].

<sup>312</sup> When we conducted a survey of certain judges on whom data was uncertain about prior employment background, we obtained an extraordinary rate of return from the federal judges to whom the survey was sent, in excess of 90%.

<sup>313</sup> SHELDON GOLDMAN, *PICKING FEDERAL JUDGES* 352 (1997) [hereinafter GOLDMAN, *Picking Federal Judges*].

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 352, 358.

<sup>316</sup> See, e.g., Brudney, Schiavoni & Merritt, *supra* note 197, at 1702; Ashenfelter, Eisenberg, & Schwab, *supra* note 156, at 274; Goldman, *supra* note 6, at 498–99.

MAINLINE PROTESTANT: Judges affiliated with Mainline Protestant denominations<sup>317</sup> accounted for 37.3% (or 554) of the judicial participations.

BAPTIST: Baptist Judges accounted for 6.3% (or 94) of the observations.

OTHER CHRISTIAN: Judges affiliated with other Christian denominations or sects accounted for a total of 9.1% (or 135) of the judicial participations. Of these, 7.3% (or 108) involved judges who identified themselves as "Protestant;" 0.1% (or two observations) involved judges who were Eastern Orthodox; 0.5% (or 7) involved Quaker judges; 0.9% (or 14) involved Mennonite judges; and 0.3% (or 4) involved judges who identified themselves only as "Christian."

JEWISH: Jewish judges accounted for 12.7% (or 189) of the judicial participations.

OTHER: Judges with other religious affiliations accounted for 3.1% (or 46) of the observations. Of these, 1.3% (or 19) were Unitarian; 1.3% (or 19) were Mormon; 0.1% (or 1) were Christian Scientist; 0.4% (or 6) were Bahai; and 0.1% (or 1) were Ethical Culturalist.

NONE: Judges who did not designate a religious affiliation accounted for 5.5% (or 81) of the judicial participations. In contrast with the coding for the claimant's religious affiliation in the Free Exercise/Accommodation set of decisions,<sup>318</sup> we regarded this category as a proxy for no religious affiliation rather than as signifying missing information. Most federal judges have been asked on more than one occasion by judicial biographers and researchers for information about their religious affiliation, and, thus, the failure to identify such constitutes an affirmative decision by that judge. While a few of these judges may have a religious affiliation and regard any inquiry as an invasion of privacy, we concluded that the more reasonable interpretation is that most such judges do not have a meaningful religious adherence. Individuals who are actively affiliated with a religious body are not likely to be reluctant so to acknowledge. Moreover, where religious affiliation is not volunteered by a judge, researchers have reviewed other biographical information, including information sought by the Senate Judiciary Committee during the confirmation process about membership in organizations, and yet have discovered no evidence of involvement with a religious entity. In sum, coding of a judge in this category is not due to lack of information but rather to a

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<sup>317</sup> Mainline Protestantism was defined as consisting of the following denominations: American Baptist, Christian Church (Disciples of Christ), Church of the Brethren, Episcopal, Lutheran (except Missouri Synod), Moravian Church, Presbyterian, Reformed Church, Congregational/United Church of Christ, and United Methodist.

<sup>318</sup> See *supra* Part IV.A.3.

documented absence of religious affiliation. Accordingly, we concluded that we may safely assume that all or the vast majority of judges in this category had no active involvement with organized religion at the time of confirmation. Even assuming that some of these judges do have personal religious beliefs, their resistance to public identification and the absence of any ongoing involvement with an organized community of faith indicates a distinctly secular approach to the public dimension of human life, consistent with that of those judges possessing no religious beliefs.

As the excluded reference variable, we selected MAINLINE PROTESTANT, on the theory that Mainline Protestantism as the dominant cultural position among the elites in American government, as well as representing more than a third of the judicial participations in our study, constituted the fundamental center for purposes of comparison.<sup>319</sup>

Information on the religious background of federal appellate judges was obtained primarily from the on-line multi-user database compiled by Gary Zuk, Deborah J. Barrow, and Gerard S. Gryski<sup>320</sup> (together with some independent research that we conducted into judicial biographies and confirmation hearing records) and that of district court judges from the generosity of Sheldon Goldman.

Stephen Carter has explained the potentially “subversive” role of religion “because it focuses the attention of the believer on a source of moral understanding that transcends both the authority of positive law and the authority of human moral systems.”<sup>321</sup> The teachings of religion, assuming they take root in the believer, “provide[] the believer with a transcendent reason to question the power of the state and the messages of the culture.”<sup>322</sup> The source of that religious teaching is of great significance:

A devout Christian will not see the world the same way as a devout Muslim, who will not see the world the same way as a devout Jew, who will not see the world the same way as a devout Hindu. And, within these broad and often vague religious categories, the differences multiply. A believing Shiite understands life differently than a believing Sunni, a believing Roman Catholic differently than a believing Southern Baptist. These differences are not trivial. They are not “just” about spirituality. They are about life.<sup>323</sup>

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<sup>319</sup> See Songer & Tabrizi, *supra* note 7, at 513 (adopting Mainline Protestant category as the excluded dummy variable in a study of the influence of religious affiliation on state supreme court justices).

<sup>320</sup> Multi-User Database on Appeals Court Judges, *supra* note 311.

<sup>321</sup> STEPHEN L. CARTER, GOD’S NAME IN VAIN 30 (2000).

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*



In noting the religious background of the judges, we remain cognizant of the fact that “[m]embership in social groups has different degrees of importance, or salience, to people.”<sup>324</sup> Cynthia Toolin identifies four categories of group membership, with different levels of meaningfulness to the member:

1. *a descriptive label*, a category that expresses a person’s characteristics with minimal or no effect on external behavior;
2. *a social declaration*, a category that expresses an external behavior that a person wants others to see;
3. *a distinctive affirmation*, a category that expresses self-distinction and has a strong effect on external behavior; or
4. *a definitive statement*, a category that expresses what permeates a person’s inner life and has a significant effect on external behavior.<sup>325</sup>

As an example of the varying degrees with which social group affiliation may affect a person’s behavior, with pertinence to the general subject of religion and public policy, the voter data from the most recent presidential election demonstrates that a person’s level of religious observance was a more significant influence upon voting behavior than mere denominational affiliation. With the exception of African Americans and Jews, more religiously observant Americans, across denominational lines, tended to vote more conservatively (Republican) than their secular or less devout counterparts.<sup>326</sup> According to a post-election 2000 survey conducted by the University of Akron, for example, Catholics who regularly attended Mass preferred Republican George W. Bush by a 14-point margin (57 to 43%), while less observant Catholics went in the opposite direction and opted for Democrat Al Gore by an 18-point margin (59 to 41%).<sup>327</sup> Among

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<sup>324</sup> Cynthia Toolin, *From Descriptive Label to Defining Statement*, CATHOLIC DOSSIER (July–Aug. 2001), at 27, 27; see also Collett, *supra* note 2, at 1285 (noting “affiliation with any particular religious community does not equal personal acceptance of any particular tenet or teaching of that community”).

<sup>325</sup> Toolin, *supra* note 324, at 27–28.

<sup>326</sup> See, e.g., Ronald Brownstein, *Attendance, Not Affiliation, Key to Religious Voters*, L.A. TIMES, July 16, 2001, at A10 (reporting that “the key to political loyalty is not so much religious *affiliation* as religious *practice*,” in which the most religiously observant regardless of faith are attracted to the Republican Party, while more secular voters have moved to the Democratic Party).

<sup>327</sup> John C. Green, James L. Guth, Lyman A. Kellstedt, & Corwin E. Smidt, *How the Faithful Voted: Religion and the 2000 Presidential Election* at 4 (tbl. 1) (unpublished manuscript, 2001) (reporting findings of the Third National Survey of Religion and Politics conducted by the University of Akron); see also Michael Barone, *The 49 Percent Nation*, NAT’L J., June 9, 2001 (discussing the University of Akron survey).

white Mainline Protestants, the figures were similarly disparate (although both groups supported Bush)—by 66 to 34% among the more observant and by 57 to 43% among the less observant.

Unfortunately, however meaningful it may be, there is no ready means by which to evaluate each judge's level of religious observance or to measure, beyond the judge's decision whether or not to reveal his or her religious beliefs, the importance that the religion's precepts have in the judge's private, much less public, life. Thus, it is possible that a large number of nominal or less observant fellow religionists may mask or dilute the influence of religious beliefs upon the behavior of a smaller number of devoutly religious judges.<sup>328</sup>

In addition, it is often said today that the greatest religious divisions are no longer across denominations but rather between traditionalist (or conservative) and modernist (or liberal) elements within each denomination.<sup>329</sup> For example, there may be greater commonality in world view between an orthodox Catholic and a conservative Baptist than between either and a liberal Catholic or Baptist.<sup>330</sup> Robert Wuthnow has demonstrated that, on subjects of cultural or social values, the categories of "religious liberals" and "religious conservatives" are more important than denominational labels.<sup>331</sup> Again using presidential election voter data as one measure of how this internal religious division is reflected in views on public policy, the University of Akron survey results from the 1996 presidential election found that, while Democratic incumbent Bill Clinton swept to an easy victory over Republican Bob Dole among all voters and by large margins among modernist Catholics (57 to 31%) and modernist Mainline Protestants (54 to 42%), Bob Dole polled impressive support from traditionalist Catholics (52 to 39%) and traditionalist Mainline Protestants (63 to 31%), as well as from among traditionalist evangelical Protestants (74 to 22%) and Mormons (74 to 21%).<sup>332</sup>

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<sup>328</sup> See George, *supra* note 33, at 26 (noting "several inherent difficulties with constructing a sound model of the effect of religious identification on judicial behavior," including that "the strength of religious identification varies substantially among individuals, [that] the perspective of religious groups vary over time, [and that] the relationship between socioeconomic status and religion is dynamic").

<sup>329</sup> ROBERT WUTHNOW, *THE RESTRUCTURING OF AMERICAN RELIGION: SOCIETY AND FAITH SINCE WORLD WAR II* 134–38 (1988); Stephen J. Stein, *Religion/Religions in the United States: Changing Perspectives and Prospects*, 75 IND. L.J. 37, 57–58 (2000).

<sup>330</sup> For further discussion of the points of commonality between orthodox Catholics and conservative Baptists in terms of the religious affiliation of claimants in Free Exercise/Accommodation cases, see *supra* Part IV.A.3.

<sup>331</sup> WUTHNOW, *supra* note 329 at 134–38; Stein, *supra* note 329, at 57.

<sup>332</sup> John Green, Lyman Kellstedt, James Guth & Corwin Smidt, *Who Elected Clinton: A Collision of Values*, FIRST THINGS, (Aug./Sept. 1997), at 35 (reporting the results of the 1996 National Survey of Religion and Politics conducted by the University of Akron).

Unfortunately, again, we could not gather information about each judge's orthodoxy in religious faith or lack thereof. However, prior empirical analysis provides some support for distinguishing among religious denominations in terms of ideological leanings, with secularists, African-American Protestants, and Jews voting heavily Democratic; Mainline Protestants moving somewhat away from the Republican Party (although still strongly trending Republican); and Catholics becoming a rather-evenly divided and important swing block; and with conservative Protestants leaning Republican.<sup>333</sup>

As Tracey George explains, the traditional hypothesis for religion as a background variable for judges has been that members of minority religions, such as Catholics and Jews, "were more receptive than Protestants to claims of the economically and politically disadvantaged."<sup>334</sup> While this hypothesis found some support in research results in the 1960s, more recent studies generally have failed to find a significant relationship between a judge's religious affiliation and the outcome of decisions in most types of cases.<sup>335</sup> In a very recent study of judicial responses to claims for lesbian and gay rights, Daniel Pinello found that such claims were received most favorably by Jewish judges and least favorably by Catholic judges.<sup>336</sup> Donald Songer and Susan Tabrizi found that Catholic and Jewish state supreme court justices appeared to be slightly more liberal than Mainline Protestant justices, although the difference was not statistically significant, while evangelical Christian justices were substantially more likely to support conservative decisions in death penalty, sex discrimination, and obscenity cases, and further, that this influence was independent of other factors such as party identification.<sup>337</sup>

On the subject of the influence of religious background, no prior study has concentrated as directly as ours upon that field in which religious background would seem most salient, that is, cases involving religious freedom. As noted earlier,<sup>338</sup> the most prominent and consistently significant variables in this study were those of the religious affiliation of the deciding judges. In order of

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<sup>333</sup> See, e.g., CARTER, *supra* note 321, at 46–48 (discussing and analyzing voting data compiled from National Election Studies, Center for Political Studies, University of Michigan, the NES Guide to Public Opinion and Electoral Behavior); Jeff Manza & Clem Brooks, *The Religious Factor in U.S. Presidential Elections, 1960–1992*, 103 AM. J. SOC. 38, 52–73 (1997).

<sup>334</sup> George, *supra* note 33, at 25–26.

<sup>335</sup> *Id.* (reporting results of prior studies); Brudney, Schiavoni & Merritt, *supra* note 197, at 1715 (finding no significant relationship between the religious background of judges and judicial decisions on labor law cases).

<sup>336</sup> DANIEL R. PINELLO, *GAY RIGHTS AND AMERICAN LAW* 88 (2003) (finding, for example, that in lesbian and gay rights cases in which the outcome was not dictated by precedent, the claim was accepted by 68.5% of Jewish judges and 50.6% of Protestant judges but only by 44.8% of Catholic judges).

<sup>337</sup> Songer & Tabrizi, *supra* note 7, at 520–23.

<sup>338</sup> See *supra* Parts II, IV.

prominence, the following judicial religious backgrounds proved most significant: Jewish, Other Christian, and Catholic.

As the most clearly distinctive religious background variable in terms of consistent influence in multiple parts of our study, Jewish judges were significantly more likely both to uphold claims for exemption by religious dissenters under the Free Exercise/Accommodation model<sup>339</sup> and to approve of claims challenging official governmental acknowledgment or affirmative accommodation of religion under the Establishment model.<sup>340</sup> Because that combination of positions with respect to the two Religion Clauses is the very definition of the integrated Anti-Political model, Jewish judges also were significantly more likely to follow that theoretical approach.<sup>341</sup> Moreover, our confidence level in these findings is very high, with Jewish affiliation being significant at the 99% probability level with respect to the Free Exercise/Accommodation model and the Anti-Political model, and remaining above the 95% probability level for the Establishment model.

To emphasize the points made earlier in our discussion of the Anti-Political model,<sup>342</sup> because Jews have been a distinct minority in American religious life and have suffered societal discrimination in the past, we would expect judges from the Jewish religious tradition to respond generously to claims by religious minorities for exemption from governmental regulations or actions and to resist official governmental incorporation of majoritarian religious beliefs. Moreover, this distinctly Jewish attitude toward constitutional questions of Church and State exists independent of party affiliation or ideology, appearing to motivate Jewish judges regardless of whether they otherwise may be labeled as conservative or liberal on other legal or political issues. In sum, our study suggests that something about the Jewish experience or perspective moves a Jewish judge toward this particular approach to religious freedom issues, even when controlling for other background or attitudinal variables.

In most of these models, the influence of Jewish affiliation upon judges worked in parallel with the influence for other judges of an affiliation with a non-mainstream Christian fellowship. Under both the Free Exercise/Accommodation model<sup>343</sup> and the Anti-Political model,<sup>344</sup> Jewish judges were joined in significant correlation (also at the 99% probability level) by judges affiliated with non-mainstream Christian denominations, that is, Christian fellowships other than the Catholic Church, Mainline Protestant denominations, and Baptist

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<sup>339</sup> See *supra* Part IV.A.1, Tbl. 5.

<sup>340</sup> See *supra* Part IV.B.1, Tbl. 6.

<sup>341</sup> See *supra* Part II.B.3, Tbl. 2.

<sup>342</sup> See *supra* Part II.B.3.

<sup>343</sup> See *supra* Part IV.A.1.

<sup>344</sup> See *supra* Part II.B.3.

congregations.<sup>345</sup> Moreover, the confidence level in these findings is also high, as significance for Other Christian judges reached the 99% probability level. As noted in our discussion of the Anti-Political Model,<sup>346</sup> for purposes of our study, the “Other Christian” religious affiliation was defined more by what it is not—that is, these judges did not specifically identify themselves with the Catholic-Protestant mainstream. We suggest that these judges generally belong to less conventional or non-denominational Christian fellowships.<sup>347</sup> If that understanding is correct, then such judges may be more skeptical of governmental determinations that implicate religion precisely because those political decisions are likely to reflect the priorities and value choices of the dominant religious majority.

However, the parallel pattern between Jewish and Other Christian judges weakened somewhat with respect to the Establishment model. Although Jewish judges were significantly more likely to uphold Establishment Clause challenges to government action, the significance level for Other Christian judges fell to the 91% probability level or lower, depending on the set of variables. Thus, while closely connected, the perspective and approach of Jewish and non-mainstream Christian judges is not fully aligned.

Nonetheless, our study suggests a notable congruity between the attitude toward religious freedom matters between two religious communities not generally known for political accord—Jews and non-denominational Protestant Christians. What they do have in common—a tradition of religious dissent from mainstream or majoritarian religion—may be what brings them together on these issues.

As a third category of judicial religious affiliation deserving discussion, the influence of Catholic Church membership upon judges so affiliated was more contained, emerging to full significance only with respect to one important dimension of the Church and State debate—education.<sup>348</sup> In the context of free exercise claims in which parents or students sought exemption on religious grounds from school policies or insisted upon accommodation by school authorities of religious practices, Catholic judges were significantly more likely

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<sup>345</sup> See *supra* Tbl. 2, Tbl. 5.

<sup>346</sup> See *supra* Part II.B.3.

<sup>347</sup> As discussed above, the largest single segment of judges placed into the “Other Christian” category were those identifying themselves as “Protestant” without an accompanying denominational affiliation. Accordingly, some of these judges may in fact be members of denominations that fall within the Mainline Protestant category. However, we suggest that judges who deferred denominational identification are less likely to belong to well-identified mainstream denominations and more likely to belong to the non-denominational churches that both fall outside of the mainstream and that have increased in size in recent decades.

<sup>348</sup> For further discussion of these subsets of the Free Exercise/Accommodation and Establishment models, see *supra* Parts IV.A.2, IV.B.2.

(at the 95% probability level) to be receptive to those religious claimants. In the context of Establishment Clause claims challenging affirmative acknowledgment of religion in a public school setting or government aid to private religious schools, Catholic judges were significantly less likely (at the 95% probability level) to sustain those challenges.<sup>349</sup>

Looking at the four theoretical models toward the Religion Clauses of the Constitution, the variable for Catholic judges came closest to being significant on the Pro-Religion Model, rising to the 93% probability level.<sup>350</sup> While this falls just below the standard significance level of 95% and thus makes us wary of declaring this result as a “finding,” the variable does point in the anticipated positive direction for this model—that is, being a Catholic made a judge more likely to be “Pro-Religion.” In any event, the fact that Catholic judges were distinctive in approach to religious freedom issues in the educational context—and again in the “Pro-Religion” direction—confirms that further study of this particular religious affiliation is merited.

Finally, we also created a special variable to see if judges were more likely to look with favor upon a claim by a fellow believer in the same religious tradition. A “Religious Correlation” variable was coded as “1” if the judge shared the same religious affiliation as the claimant in a Free Exercise/Accommodation case. For purposes of this Religious Correlation variable, we cautiously coded for a direct correlation only if both the judge and the claimant were Jewish, were Catholic, or otherwise shared an identical denominational affiliation (for which specific denominational information for each judge was referenced, even though that judge may necessarily have been included in a more general category of religious affiliation when we created dummy variables for the regression runs). Of the 969 observations included in the basic Free Exercise/Accommodation model of our study, 47 instances (or 4.9%) involved a judge of the same religious affiliation as a claimant.

As a comforting reminder that impartiality amongst persons remains a hallmark of our federal judiciary, this Religious Correlation variable simply was not significant in our study. While a judge’s worldview, including that perspective formed by religious belief, may influence that judge’s general view of legal doctrine at the margins and in the difficult cases where precedent does not establish clear parameters, we found no evidence that it further influences a judge to offer favoritism to those of the same religious background. Even when the opportunity was most poignantly presented, religious nepotism was not manifested.

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<sup>349</sup> While these focused regression runs are not reported with tables in this Article, the data is available from the authors.

<sup>350</sup> For further discussion of Catholic judges and the Pro-Religion model, see *supra* Part II.A.3, Tbl. 1.

## 2. Religious Demographics of Judge's Community

In addition to identifying the judge's individual religious affiliation or upbringing, we have also included four variables designed to measure the religious demographics of the community in which the judge lives.

While the study of the religious characteristics of a community has been common in sociological and epidemiological research,<sup>351</sup> to our knowledge this dimension has not previously been explored in research on judicial decisionmaking. One of the reasons for that neglect may be that, while correlating the judge's own religious affiliation to his or her decisions may seem intuitive, suggesting a connection between aggregate data about a community collectively and individual-level judicial decisions naturally raises questions.<sup>352</sup> However, given that the religiosity of and religious demographics in an area may exert a structural effect on a community and everyone living and working therein, because "social context influences human behavior,"<sup>353</sup> an investigation of the possible association indeed is sensible. Because judges as human actors and social beings live and work in a particular social milieu, the religious context or atmosphere of that community may influence a judge's perception of legal claims that implicate religion or that involve appeals to religious adherence.

Thus, one might hypothesize that a judge living and working in a more secular community would be less apt to value claims of religious belief, or that a judge who belongs to a community with a more heterogeneous religious makeup and thus who frequently comes into contact with followers of a wide variety of faiths in daily life may have greater tolerance for practices by non-mainstream religions of the type that may provoke a clash with a governmental directive and give rise to litigation on free exercise of religion.<sup>354</sup>

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<sup>351</sup> See, e.g., Christopher G. Ellison, Jeffrey A. Burr & Patricia L. McCall, *Religious Homogeneity and Metropolitan Suicide Rates*, 76 SOC. FORCES 273, 287 (1997) (finding that the religious homogeneity of a metropolitan area is inversely associated with the suicide rate); George K. Jarvis & Herbert C. Northcott, *Religion and Differences in Morbidity and Mortality*, 25 SOC. SCI. & MED. 813, 822 (1987) ("Religion has a powerful effect on the way many people live, on the quality of their life, and on the length of time they live to experience that quality."); Jeffrey W. Dwyer, Leslie L. Clarke & Michael K. Miller, *The Effect of Religious Concentration and Affiliation on County Cancer Mortality Rates*, 31 J. HEALTH & SOC. BEHAV. 185, 197 (1990) ("Counties with high concentrations of conservative Protestants, moderate Protestants, or Mormons have the lowest cancer mortality rates. Conversely, counties with greater proportions of liberal Protestants, Catholic, and Jewish communicants have higher cancer mortality rates.").

<sup>352</sup> See Dwyer, Clarke & Miller, *supra* note 351, at 187–88 (responding to criticisms of the use of aggregate data and noting the concern "about committing the ecological fallacy by making individual-level interpretations based on aggregate data"); Ellison, Burr & McCall, *supra* note 351, at 289–90.

<sup>353</sup> Dwyer, Clarke & Miller, *supra* note 351, at 187.

<sup>354</sup> See Clyde Wilcox & Rachel Goldberg, *Public Opinion on Church-State Issues in a*

Three variables in our study measure the nature and rate of religious adherence within the community: the percentage of Catholic adherents compared to the entire population (Catholic Percentage); the percentage of Jewish adherents compared to the entire population (Jewish Percentage); and the religious adherence rate overall which serves as a proxy for the general religiosity or "religious concentration"<sup>355</sup> of that community (Adherence Rate). (By exclusion, the percentage of Protestant Christian adherence in a community serves as the comparison variable.) The source of the religious demographic data is the 1990 survey conducted by the Glenmary Research Center, *Churches and Church Membership*, which is based upon reports from 133 Judeo-Christian religious bodies regarding the number of adherents, broken down by county within each state.<sup>356</sup> In contrast with the information on adherence rates for other religious bodies, the county estimates for Jewish population in the study were derived from the *American Jewish Year Book*.<sup>357</sup> Given that the year 1990 falls directly in the middle of the period for our study (1986–1995), it is the best measure of the religious demographics for our purposes (compared to prior and subsequent related surveys for 1980 and 2000).<sup>358</sup>

For purposes of these three variables, we have defined the judge's community by the county in which the judge maintains his or her chambers. For the communities included in our study, Catholic Percentage ranged from 0.5 to 85.0% with a mean of 22.9%; Jewish Percentage from 0 to 24.2% with a mean of 2.3%; and Adherence Rate from 22.7 to 85.5% with a mean of 57.8%.

Religious adherence in the United States historically and today varies widely from place to place. As described by Christopher Ellison, Jeffrey Burr, and

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*Changing Environment*, 41 J. FOR SCI. STUDY RELIGION 369, 371, 373–74 (2002) (postulating a "religious exposure model" by which "interactions with those of other faiths might lessen religious prejudice and increase support for free exercise" and finding that increased religious diversity in the Washington, D.C. metro area led to more libertarian positions in public opinion polls on free exercise claims).

<sup>355</sup> Dwyer, Clarke & Miller, *supra* note 351, at 185.

<sup>356</sup> MARTIN B. BRADLEY, ET AL., GLENMARY RESEARCH CENTER, CHURCHES AND CHURCH MEMBERSHIP IN THE UNITED STATES 1990 (1992) [hereinafter CHURCHES AND CHURCH MEMBERSHIP 1990].

<sup>357</sup> THE AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH YEAR BOOK (David Singer & Ruth R. Seldin eds., 1990).

<sup>358</sup> As noted, the religious adherence data reported in *Churches and Church Membership in the United States 1990* is compiled by county. CHURCHES AND CHURCH MEMBERSHIP, *supra* note 341. Each judge was placed in the county in which the city was located where he or she maintained chambers. For two judges residing in Puerto Rico, while information from alternative sources was available on Catholic and Jewish percentages, LAROUSSE DICTIONARY OF BELIEFS AND RELIGIONS app. at 582 (Rosemary Goring ed., 1994); DEBORAH KENT, AMERICA THE BEAUTIFUL: PUERTO RICO 25 (1992), information was not available on overall adherence rate, so we substituted the mean adherence rate from all judicial participations in the study to avoid excluding these two judges from the study.



Patricia McCall, the metropolitan Northeast has been dominated by Roman Catholicism, Midwestern settings have tended to be more religiously pluralistic, the American South has been the center of conservative evangelicalism, and the Pacific Northwest has been characterized by low church membership and attendance rates.<sup>359</sup>

In addition, as mentioned above, on the hypothesis that a judge's openness to religious freedom claims, especially free exercise claims which tend to come from religious outsiders, may be influenced by the judge's experience with alternative religious perspectives, we have included a special variable to measure the religious diversity—or more specifically the lack thereof—in the community (Religious Homogeneity). Christopher Ellison, Jeffrey Burr, and Patricia McCall suggest that “the religious homogeneity of an area may enhance the social integration and sense of moral community among residents.”<sup>360</sup> Where religious homogeneity is high, the likelihood increases “that social interaction will occur, and social bonds will form, among persons from similar, rather than disparate, religious backgrounds.”<sup>361</sup>

In a study which found that suicide rates were inversely associated with religious homogeneity, Ellison, Burr, and McCall generated a Herfindahl Index of religious homogeneity for 296 standard metropolitan statistical areas (SMSAs),<sup>362</sup>

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<sup>359</sup> Ellison, Burr, & McCall, *supra* note 351, at 277–78.

<sup>360</sup> *Id.* at 276.

<sup>361</sup> *Id.* at 287.

<sup>362</sup> *Id.* at 278–81. A few points of qualification or explanation about the use of this data, and its comparison to other data used in our study, should be mentioned here. In contrast with the Glenmary Research Center data that reports adherence rates by county, Ellison, Burr, and McCall, as noted, calculated the Herfindahl score of religious homogeneity on the basis of SMSAs, which they derived by using “Census-generated lists to map the appropriate Glenmary county data to the relevant SMSA boundaries.” *Id.* at 280. For purposes of our Religious Homogeneity independent variable, we have adopted the data generously provided by Ellison, Burr, and McCall, and thus adhered to that SMSA reference point. However, for purposes of our Catholic Percentage, Jewish Percentage, and Adherence Rate variables, we have maintained the county level reference point from the Glenmary Research Center data. For seventy-one of the 1484 judicial participations in our study, Herfindahl score information on religious homogeneity was unavailable because the judge involved did not maintain chambers within a metropolitan area for which Ellison, Burr, and McCall had derived a Herfindahl score. For these participations, a mean Herfindahl score was inserted to avoid excluding these participations as involving missing data. By maintaining the county-level data for the alternative demographic variables, we were able to include specific data for these seventy-one participations on Catholic Percentage, Jewish Percentage, and Adherence Rate. Still, it should be understood in evaluating our results that the reference point of the different categories of measurement are somewhat different, although greatly overlapping; still that difference may provide some healthy and contrasting diversity in measurement approach within our study. Moreover, in contrast with the Glenmary Research Center data for 1990 that we have adapted for our Catholic Percentage, Jewish Percentage, and Adherence Rate variables described above, the Ellison-Burr-McCall data was derived from the 1980 Glenmary Research Center survey.

which data they generously have shared with us for this study. The Herfindahl Index, which was originally developed to measure the degree of concentration of a commercial enterprise in a particular market,<sup>363</sup> such as for determining whether a monopoly exists in antitrust cases or whether a merger of companies should be approved,<sup>364</sup> has been “employed more recently to tap levels of religious concentration in areal units.”<sup>365</sup> As used for measuring religious homogeneity, the Herfindahl Index “indicates the probability that any two people, selected randomly from the churching population, share the same religious faith or affiliation.”<sup>366</sup>

For the Religious Homogeneity variable in our study, we adopted the Ellison-Burr-McCall estimation of religious homogeneity through classification of religious denominations or sects into eight families or categories, consisting of conservative Protestant, moderate Protestant, liberal Protestant, miscellaneous

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While it might have been preferable to re-generate this data based upon the 1990 data for our current study, as 1990 falls at the midpoint of the 1986–1995 timeframe of our study, we did not undertake that task. We do not believe this temporal contrast in data undermines confidence in our results for at least two reasons. First, given that the religious demographics of a large metropolitan community do not evolve rapidly, we would not expect the data to be significantly different between 1980 and 1990. Second, because our interest is in studying the influence of a community’s demographics on a judge’s attitudes, and that of course is an effect that must be felt over a number of years to be persuasive, use of 1980 demographic data to study an influence on judicial decisions rendered beginning in 1986 should capture the atmosphere of the community in which that judge has worked for the formative years leading up to ascension to the bench and participation in the decisions in our study. Just as data on the selectivity of an undergraduate institution should correlate to the period in which the judges collectively were most likely to have attended college rather than the present day which long post-dates their graduation, *see infra* Part V.A.4, data that reflects the demographics of the community in which a judge lives ideally would account for more than the status at a particular moment in time. Thus, again, having alternative demographic data from both 1980 and 1990 may enhance the breadth of our study.

<sup>363</sup> Ellison, Burr & McCall, *supra* note 351, at 280.

<sup>364</sup> *See, e.g.,* Arkansas Elec. Energy Consumer v. F.E.R.C., 290 F.3d 362, 370 & n.6 (D.C. Cir. 2002); F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 716 & n.9 (D.C. Cir. 2001); AlliedSignal, Inc. v. B.F. Goodrich Co., 183 F.3d 568, 574 & n.3 (7th Cir. 1999).

<sup>365</sup> Ellison, Burr & McCall, *supra* note 351, at 280.

<sup>366</sup> *Id.* at 281. As noted, the Religious Homogeneity data is based upon the “churching population,” that is, the Herfindahl Index was calculated by Ellison, Burr, and McCall based upon adherents in an SMSA, with only religiously-affiliated residents as the denominator. *Id.* at 280–81. As our alternative demographic measurement variables, we deliberately based the Catholic Percentage, Jewish Percentage, and Adherence Rate variables in our study upon the rate of incidence as compared with the entire community, that is, the denominator is the total population including unchurched citizens. However, Ellison, Burr, and McCall also conducted ancillary analyses which used the total population of the SMSA as the denominator of the Herfindahl Index and found similar results in their study of correlation with suicide rates. *Id.* at 291 n.9.

Protestant, Catholic, Orthodox, Jewish, and Mormon.<sup>367</sup> As Ellison, Burr, and McCall explain, “[t]his approach is consistent with arguments that the major social, theological, and political divisions on the contemporary religious scene involve these categories (or ‘families’), and there is relatively little heterogeneity within each of these categories.”<sup>368</sup>

The Herfindahl Index for Religious Homogeneity of judges’ communities for the judicial participations in our study ranged from a low of 23 to a high of 76, with a mean of 41.

Reporting the findings of our study, two of these demographic variables—Jewish Percentage and Adherence Rate—proved to be stable and significant influences in the religious freedom models in our study:

Most consistently across several models, a higher rate of general adherence to organized religion in a community was associated with successful outcomes by religious claimants in the Free Exercise/Accommodation set of decisions,<sup>369</sup> with successful outcomes by those challenging government interaction with religion under the Establishment set of decisions,<sup>370</sup> and with the Anti-Political model which integrates those two models in the same way (that is, includes the tendency to support both free exercise and establishment claims).<sup>371</sup> The significance level was strong (at the 95% probability level) for the Free Exercise/Accommodation and Establishment models, and was even stronger for the integrated Anti-Political model (at the 99% probability level). In sum, the greater the religiosity of a community, the more likely that a judge living in that community would adhere to what is the traditional liberal approach, which combines a “strong” free exercise theory with a “strong” Establishment theory.<sup>372</sup>

On the free exercise side of the equation, we indeed would expect that a community with a higher level of religious affiliation would be associated with a greater receptivity to the religious believer who seeks accommodation of religious

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<sup>367</sup> *Id.* at 280. Ellison, Burr, and McCall alternatively estimated the Herfindahl Index for each SMSA based upon each of the 111 religious denominations reported in the Glenmary Research Center data. *Id.* Because their results confirmed the greater explanatory power of the Herfindahl Index when calculated based upon religious groups rather than the full list of specific denominations, and because the results for both alternative calculations are consistent (although the measurable effect of religious homogeneity is muted in certain circumstances when the phenomenon is dissipated by dividing homogeneity among related specific denominations), *id.* at 283, 288, we adopted the eight category or family calculation method as preferable.

<sup>368</sup> *Id.* at 280 (citing WADE CLARK ROOF & WILLIAM MCKINNEY, AMERICAN MAINLINE RELIGION (1987)).

<sup>369</sup> See *supra* Part IV.A.1, Tbl. 5.

<sup>370</sup> See *supra* Part IV.B.1, Tbl. 6.

<sup>371</sup> See *supra* Part II.B.3, Tbl. 2.

<sup>372</sup> For further discussion of this theory, see *supra* Part II.B, and for the identification of this theory with the traditional liberal approach, see also *supra* Part II.D.

beliefs or practices. Precisely because such a community is composed of more individuals who have religious convictions and thus acknowledge a higher reality and transcendent values, such a community is collectively more likely to accept the notion that, in the absence of a compelling governmental interest, secular demands should be held subordinate to religious conscience.

But on the Establishment side of the equation, it is not intuitive that a less-secular community would be correlated with a theoretical approach that insists upon a stricter separation of religion from official public life. As a possible explanation for this finding, it must be remembered that a high Adherence Rate measure, signifying a greater overall degree of religious observation in a community, is not synonymous with a high Religious Homogeneity measure, which would evidence congruity of religious beliefs among the citizens in that community. Indeed, regression analysis allows evaluation of the Adherence Rate variable independent from the influences of Religious Homogeneity. Thus, because a strong overall level of religious adherence in a community emphatically is not the equivalent of uniformity of beliefs, such a community in fact may combine a high level of religious devotion with some appreciation of religious diversity, which might move that community both to be receptive to religious dissenters and to be skeptical of governmental actions that appear to elevate one form of religious tradition above others.

The other religious demographic measurement that emerges as significant in our study is the Jewish Percentage in a community, which also correlates positively with the Anti-Political Model.<sup>373</sup> A higher Jewish presence in a community was significantly associated (at the 95% probability level) with this model. Given that Jewish judges were also closely and strongly associated with the Anti-Political Model,<sup>374</sup> it is not surprising that the Jewish Percentage variable runs parallel in influential direction.

However, and confirming the importance of including religious demographic variables in our study, the reader should understand that both the Adherence Rate and Jewish Percentage demographic variables were examined through regression analysis independent of whether the particular judge him or herself adhered to any religious faith in general or was Jewish in particular. Thus, it appears that the religious environment or culture of a community may have an influence even upon those judges in that community who do not share a religious perspective. The greater presence of religious believers (Adherence Rate) and greater visibility of Jews (Jewish Percentage) appear to affect the general disposition of the larger community toward matters of Church and State—and through that social context influence the judges who work in that community.

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<sup>373</sup> See *supra* Part II.B.3, Tbl. 2.

<sup>374</sup> For further discussion of religious affiliation of judges, see *supra* Part V.A.1.

By contrast, the Catholic Percentage and Religious Homogeneity variables generally were not significant in our study.<sup>375</sup> Religious Homogeneity was significant (at the 95% probability level) in a focused regression run under the Establishment model that involved cases in which the issue was the interaction between government and religious symbols, such as incorporation of a religious icon onto a municipal logo or placement of a crèche or menorah on public property.<sup>376</sup> Thus, it may be, contrary to initial expectation, that a community with religious harmony is less anxious about solidifying the place of the dominant religion in the community through public adoption of symbols.

### 3. Sex and Race

Sex/gender and race of the judge have been standard demographic variables in empirical studies of judicial decisionmaking.

#### a. Sex

Building upon the “different voice” theory of psychologist Carol Gilligan,<sup>377</sup> feminist legal theorists have postulated that women judges would present a different perspective and behave differently in deciding cases.<sup>378</sup> Under this theory, “women tend to perceive moral conflicts as a problem of care and responsibility in relationships,” while “men tend to emphasize rights and rules.”<sup>379</sup> While eschewing the *feminist* label as invoking a political agenda, Suzanna Sherry postulates a *feminine* attitude that “define[s] human existence in terms of relationships to others and [favors] contextual societal values and individual virtues,” as contrasted with “the male emphasis on rights” and consequent “reliance on an abstract, rule-based method” for resolving disputes.<sup>380</sup>

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<sup>375</sup> Catholic Percentage appeared as significant in one Establishment ancillary regression run limited to trial judges, that not only was constructed purely for cross-check purposes but also had a very limited N count and attendant multicollinearity problems; accordingly, we do not credit that ephemeral result.

<sup>376</sup> Religious Homogeneity was significant in the Religious Symbol subset regression run in which party-of-appointing-president was adopted as the measure of ideology but fell outside of significance (dropping to the 93% probability level) when the set of variables substituted the common space score as the measure of ideology.

<sup>377</sup> CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982).

<sup>378</sup> See Davis, Haire & Songer, *supra* note 156, at 129–30 (describing theories of gender difference and judging).

<sup>379</sup> *Id.* at 129.

<sup>380</sup> Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 582–83 (1986). Subsequently, Sherry has described her view as “moderate”—that life experiences “may have a subtle effect on beliefs, attitudes, or

Thus, under this theory, female judges should be more concerned about "connection, care, response, substantive fairness, communitarian values, and context" than about "correctly applying appropriate legal rules."<sup>381</sup>

In our prior study, this theory led directly to a hypothesis that women judges would resist the federal sentencing guidelines system, "because it imposes strict and rigid sentencing rules with little regard to context or fairness in the individual case."<sup>382</sup> However, as with most other empirical studies that have found limited support for a different female perspective in judging,<sup>383</sup> sex was not a significant variable in that study.<sup>384</sup> Whether because gender-based theories of difference are wrong or overstated,<sup>385</sup> because the judicial recruitment process selects only women compatible with the views of the appointing President,<sup>386</sup> or because

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approaches"—and has sharply criticized the radical feminist view "that women have an entire world view that differs substantially from that of men and that is in some sense generally inaccessible to men." DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 30 (1997).

<sup>381</sup> Davis, Haire & Songer, *supra* note 156, at 130.

<sup>382</sup> Sisk, Heise & Morriss, *supra* note 155, at 1452.

<sup>383</sup> See, e.g., Davis, Haire & Songer, *supra* note 156, at 131–32 (finding no significant differences between male and female judges in search and seizure and obscenity cases, when controlling for party of appointing president, although finding female judges more liberal in employment discrimination cases); Gottschall, *supra* note 156, at 171–73 (finding relative similarity between President Carter's male and female appointees to the courts of appeals); John Gruhl, Cassia Spohn & Susan Welch, *Women as Policymakers: The Case of Trial Judges*, 25 AM. J. POL. SCI. 308, 311, 319–20 (1981) (finding few significant differences in the conviction rates of male and female judges, although finding female judges more likely to sentence female convicts to prison); Herbert M. Kritzer & Thomas M. Uhlman, *Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition*, 14 SOC. SCI. J. 77, 86 (1977) (concluding that female judges "behave no differently than their male colleagues" in study of sentencing); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 613–15 (1985) (finding few differences between male and female judges, with the exception of a tendency of female judges to rule in favor of government entities). But see Daniel M. Schneider, *Assessing and Predicting Who Wins Federal Tax Trial Decisions*, 37 WAKE FOREST L. REV. 473, 509–11 (2002) [hereinafter Schneider, *Assessing and Predicting*] (finding that women judges tended to rule in favor of the taxpayer in tax cases, while male judges tended to rule in the government's favor).

<sup>384</sup> Sisk, Heise & Morriss, *supra* note 155, at 1453.

<sup>385</sup> Davis, Haire & Songer, *supra* note 156, at 133 (suggesting possible reasons for absence of differences in judging between male and female judges).

<sup>386</sup> See Gruhl, Spohn & Welch, *supra* note 383, at 309 (suggesting that gender contrasts may be diluted by "powerful influences of socialization to the legal profession and to the judicial role" and the influences of "courtroom 'workgroups'" such as prosecutors and defense attorneys); Walker & Barrow, *supra* note 383, at 615 (suggesting that due to common socialization experiences of legal education and screening of the selection process, gender differences may be muted). But see Elliott E. Slotnick, *The Paths to the Federal Bench: Gender, Race and Judicial Recruitment Variation*, 67 JUDICATURE 371, 378–88 (1984) (finding distinctively different paths to the federal bench for women, including alternative career

"differences between men and women judges are neutralized by the very nature of law and legal processes,"<sup>387</sup> "[t]he weight of the evidence demonstrates that most female judges do not decide cases in a distinctively feminist or feminine manner."<sup>388</sup>

Our current study provides an additional test for the increasingly discredited theory of feminist or feminine judging. If women judges are hypothesized as being more concerned about communitarian values and relationships among people, then we would expect such judges to be more deferential to community-based rationales and less responsive to religious liberty claims, such as those arising in free exercise cases, in which an individual raises a claim of right to exemption from general societal norms.<sup>389</sup>

In our study, SEX was coded as "1" for a female judge and "0" for a male judge. Of the 1484 judicial participations in our larger models (the four theoretical models), female judges accounted for 123 (or 8.3%).

As with other empirical studies that have found limited support for a different female perspective in judging, sex was not a significant variable in our study, whether we were studying Free Exercise/Accommodation or Establishment claims or looking at the four theoretical models for the Religion Clauses of the Constitution.<sup>390</sup> Nor did sex emerge as a significant influence in any of our alternative focused and ancillary regression models.

Ordinarily, one should be cautious in drawing conclusions from the absence of significance in statistical analysis. Nonetheless, in light of the weak and sporadic findings of correlation between sex and judicial behavior in past studies, and the considerable attention given this subject in prior empirical research, we again suggest that a tentative verdict should be rendered. We believe our results

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backgrounds, such as being less likely to have held elective political office, fewer years at bar, and less likely to have been in prominent private practice); Elaine Martin, *Women on the Federal Bench: A Comparative Profile*, 65 JUDICATURE 306, 310 (1982) (finding "several marked differences" in the backgrounds of the women recently appointed to the federal bench, including that they were "far more likely to have been judges at the time of their appointment, far less likely to have been working for a large corporate law firm, and much less likely to have been party activists"); Sheldon Goldman, *Carter's Judicial Appointments: A Lasting Legacy*, 64 JUDICATURE 344, 351-52 (1981) (finding President Carter's women appointees to federal bench were less likely to have been political activists and more likely to have judicial experience).

<sup>387</sup> Davis, Haire & Songer, *supra* note 156, at 133.

<sup>388</sup> Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 919 (1995).

<sup>389</sup> See Sherry, *supra* note 380, at 604 (arguing that Justice O'Connor's conservative approach to criminal issues falls within a feminine paradigm by evidencing a communitarian attitude: "If the community is more important than individual rights, it is quite predictable that Justice O'Connor would be a strong law and order proponent: she will protect the community from crime even at the expense of the individual rights of criminal defendants").

<sup>390</sup> See *supra* Tbls. 1-6.

confirm the conclusion of one female judge who, based upon years of experience on the federal bench, said that she had “not seen any basis for believing that gender plays a role one way or the other in any particular judge’s ability or willingness to exercise self-restraint.”<sup>391</sup>

b. *Race*

With respect to race as a judge background variable, the general thesis has been that African-American judges would be more liberal, that is, more sympathetic to the “underdog” and the poor.<sup>392</sup> With a couple of exceptions in the field of criminal law, prior empirical studies have uncovered very little variation in the behavior of judges based upon race.<sup>393</sup> For that reason, researchers have postulated that legal or judicial socialization or the judicial recruitment process “screen[s] out candidates with unconventional views.”<sup>394</sup> Of course, an alternative explanation would be that race is not a driving force for judicial

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<sup>391</sup> Miriam Goldman Cedarbaum, *Women on the Federal Bench*, 73 B.U. L. REV. 39, 44 (1993).

<sup>392</sup> Susan Welch, Michael Combs & John Gruhl, *Do Black Judges Make a Difference?*, 32 AM. J. POL. SCI. 126, 127 (1988).

<sup>393</sup> See, e.g., Cassia Spohn, *The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities*, 24 LAW & SOC’Y REV. 1197, 1211–14 (1990) (finding “remarkable similarities” in sentencing decisions of black and white judges and concluding that judicial race has little predictive power); Gottschall, *supra* note 156, at 171–73 (finding, with the exception of criminal cases, minimal variances between black and white judges, even in racial discrimination cases); Thomas M. Uhlman, *Black Elite Decision Making: The Case of Trial Judges*, 22 AM. J. POL. SCI. 884, 891–94 (1978) (finding no important differences between black and white judges in criminal conviction rates and sentencing); Walker & Barrow, *supra* note 383, at 613–15 (finding marked similarity in decision-making records between black and white federal district judges in several fields); Welch, Combs & Gruhl, *supra* note 392, at 131–35 (finding little impact of black judges in overall criminal sentencing severity, but finding evidence of more equal treatment by black judges of white and black defendants in decisions to incarcerate). But see Scherer, *Blacks on the Bench*, *supra* note 197, at 19 (finding in a study of federal court of appeals judges appointed by Presidents Carter and Clinton in non-consensual search and seizure cases that “black judges are much less likely to uphold the legality of a search or seizure in which there are allegations of misconduct by the police”).

<sup>394</sup> Spohn, *supra* note 393, at 1212; see also *id.* (suggesting that judicial socialization “produces a subculture of justice and encourages judges to adhere to prevailing norms, practices, and precedents”); Uhlman, *supra* note 393, at 885 (suggesting that “atypically successful pre-judicial careers, a rigorous process of legal socialization, and special scrutiny for highly visible black jurists may attenuate the uniqueness of his role”); Walker & Barrow, *supra* note 383, at 615 (suggesting that judicial selection screening may mute differences by minority judges).



behavior, that is, that in most cases “the law—not the judge—dominates the outcomes.”<sup>395</sup>

In our prior study of judicial responses to constitutional challenges to the federal sentencing guidelines, while there was no statistically significant difference in the basic outcome of the decisions, non-white judges were correlated at the 99% probability level with adoption of an alternative constitutional theory toward that end.<sup>396</sup> Thus, our findings confirmed a tendency of minority judges to adopt a non-mainstream approach, even if these judges reached the same general outcome at basically the same rate as white judges. Still, the emergence of the influence of race in a reasoning category rather than at the outcome level suggested caution in weighing the importance of race as a factor in judicial behavior. While our findings provided support for the conclusion that non-majority judges are more willing to experiment with alternative theories, and theories that support the claims of those that many would describe as disadvantaged (i.e., criminal defendants), the effect appeared only at the margins. In other words, the race variable appeared to influence the method but not the ends of judging, at least in the context of our study. Thus, while racial background had some influence, our prior study did not support an ideological theory of race-based judging as a predictor of outcomes.

With respect to the race variable, in our prior study, we collapsed all non-white judges into a single category (MINORITY), given that the numbers of judges falling into distinct racial categories was too low for statistical analysis. We revisited that approach in this study, given an increasing recognition that just as there are differences among members of any social group, there also are meaningful differences among different racial minority groups. Accordingly, in addition to a general minority variable, we included measures of a further racial dimension in our study. Although the numbers were too low to permit including each racial grouping as a separate variable, there is research precedent for combining Asian-American and Latino judges into one dichotomous variable (ASIAN-LATINO) and African American judges (AFRICAN-AMERICAN) into another.<sup>397</sup> Given the perfect overlap between these two variables and the MINORITY variable, we necessarily considered these in separate regression runs, as alternative permutations of our standard set of variables for each model in this study.<sup>398</sup>

In our larger models—the four theoretical models—there were a total of 123 judicial participations (out of 1484) involving minority judges, of which 90 (or

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<sup>395</sup> Ashenfelter, Eisenberg & Schwab, *supra* note 156, at 281 (finding that race was not a significant influence in the mass of civil cases).

<sup>396</sup> Sisk, Heise & Morriss, *supra* note 155, at 1457–58.

<sup>397</sup> Brudney, Schiavoni & Merritt, *supra* note 197, at 1702–03.

<sup>398</sup> While the regression run using the MINORITY variable is not reported with a table in this Article, the results are available from the authors.

6.0%) involved African-American judges and 32 (or 2.2%) involved Asian-American/Latino judges (and there was one Native American observation).

Race variables proved significant in our study in two distinct ways and involving two different racial grouping variables:

First, minority-status in general was significantly (at the 99% probability level) and positively associated with a greater receptivity to that sub-set of Free Exercise/Accommodation claims involving an allegation of discrimination or unequal treatment on religious grounds.<sup>399</sup> When African-American and Asian-American/Latino judges were evaluated as separate variables, the African-American variable also was significantly (at the 95% probability level) correlated with a positive outcome on equal treatment claims, while the Asian-American/Latino variable fell below the standard significance level (to the 91% probability level).

A finding that minority judges, and African-American judges in particular, responded more favorably to claims of unequal treatment is both consistent with the traditional hypothesis borne out in some prior studies and with the growing understanding that the influence of racial background on judging is subtle and most likely to be seen in terms of equal application of the law rather than divergent general approaches to adjudication.<sup>400</sup> Given that the history of race relations in this country has been a struggle for equal rights, one would expect that claims that implicate basic principles of equality would be most likely to draw a nuanced but different treatment from minority judges. Moreover, as Thomas Berg has explained, the concern of the civil rights movement “with the unjust treatment of blacks contributed to, and helped to reinforce, a concern for the treatment of other minorities, including religious minorities.”<sup>401</sup> Given that African-Americans have been “the quintessential discrete and insular minority” subject to discrimination by the majority,<sup>402</sup> one would expect African-American judges in particular to be most receptive to the claims of discrimination by religious minorities.

Second, and less intuitively, Asian-American/Latino judges were significantly more likely (at the 95% probability level) to uphold Establishment Clause challenges to governmental action.<sup>403</sup> In this tendency, Asian-American/Latino judges were not joined by African-American judges, as the

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<sup>399</sup> For further discussion of this sub-set of cases, see *supra* Part IV.A.1.

<sup>400</sup> See Welch, Combs & Gruhl, *supra* note 392, at 131–35 (finding little impact of black judges in overall criminal sentencing severity, but some evidence of more equal treatment by black judges of white and black defendants in decisions to incarcerate).

<sup>401</sup> Thomas C. Berg, *Race Relations and Modern Church-State Relations*, 43 B. C. L. REV. 1009, 1011 (2002) (describing how the evolution of church-state jurisprudence in the Supreme Court has closely paralleled developments in race relations).

<sup>402</sup> LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 487 (2000).

<sup>403</sup> For further information on these results, see *supra* Part IV.B.1, Tbl. 6.

African-American variable did not begin to approach significance and in any event pointed in the opposite direction (was negative on Establishment Clause claims). In other words, the behavior of Asian-American/Latino judges was discretely different from and independent of those in the other largest category of racial minorities. However, since these results reflect only five judicial participations by Asian-American/Latino judges in resolving Establishment Clause claims, the finding must be received with caution. If this finding is credited, it suggests something distinctive about the experience or world-view of Asian-American and Latino citizens that generates a distrust of governmental interaction with religion.

#### 4. *Educational Background*

Sociologist Peter Berger famously observed that if India is the most religious country in the world and Sweden is the most secular, the problem with the United States is that we are a nation of Indians ruled by Swedes.<sup>404</sup> Although surveys continually reveal an intense and broad-based religious faith among Americans, the elite who dominate the worlds of academia, entertainment, news media, and government (other than elected government officials) are disproportionately non-believers or persons of marginal religious devotion. We would expect that judges who were educated in elite or prestigious undergraduate institutions and law schools would have been heavily exposed to a more liberal and a more secular world-view during those formative years leading to the professional degree.

##### a. *Prestige of Undergraduate Institution*

We hypothesize that education at an elite, selective school—which tends to reflect a more secularist perspective—will be associated with a less favorable attitude toward the claims of those requesting religious exemptions or toward governments affirmatively interacting with religious entities. College selectivity has also been associated with socioeconomic background, as students who could afford to attend the more elite schools tended to have been raised in more privileged circumstances.<sup>405</sup> However, while higher family income may tend to be associated with more conservative political views in some contexts, the social and economic elite in the United States are also more likely to view the world from a predominately secular perspective and to be less religiously-devout. In sum, greater selectivity of undergraduate institution, both in terms of acculturation

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<sup>404</sup> PETER L. BERGER, *THE SACRED CANOPY, ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* 30 (1967).

<sup>405</sup> Brudney, Schiavoni & Merritt, *supra* note 197, at 1750; *see also* Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325, 348 (2001) [hereinafter Schneider, *Empirical Research on Judicial Reasoning*] (“Education broadcasts socioeconomic signals.”).

and as a proxy for members of the cultural elite, points in the direction of less openness to religion in the public square.<sup>406</sup>

As a proxy for the prestige of an undergraduate institution, we followed the lead of James Brudney, Sara Schiavoni, and Deborah Merritt, and more recently Daniel Schneider, who in studies of judicial decisionmaking have adopted the scale for selectivity of an undergraduate institution calculated by educational sociologist Alexander Astin.<sup>407</sup> The Astin scale, dated as it is from 1962, is contemporaneous or nearly so with the time period during which federal judges on the bench in the mid-1980s to mid-1990s would have received an undergraduate education; moreover, the selectivity or prestige of a college or university is likely to change only slowly over time.<sup>408</sup>

Our ASTIN variable did not prove to be a significant variable in any of the standard models of study, whether we were studying Free Exercise/Accommodation or Establishment claims or looking at the four theoretical models for the Religion Clauses of the Constitution.<sup>409</sup>

However, this measure of the prestige of the undergraduate institution attended by a judge did emerge in one distinct but very interesting and expected area—claims for religious accommodation in the very context of education.<sup>410</sup> In one of two focused regression runs involving cases where religious claimants

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<sup>406</sup> We considered including, but for reasons of theory and practicality discarded, a variable for religious affiliation by an undergraduate institution. As a matter of theory, given the increasing secularization over the past several decades of colleges and universities that traditionally had or even now retain a religious affiliation, we doubted whether such a distinction could be meaningful without a further and detailed exploration—college-by-college—of whether the religious affiliation remained vital and affected the curriculum. As matter of practicality, identifying whether each of the many institutions attended by the judges in our study had a religious affiliation at the time the judge attended would have been more burdensome than we believed justified in light of our doubts about the validity of such a measure.

<sup>407</sup> ALEXANDER W. ASTIN, WHO GOES WHERE TO COLLEGE? 57–83 (1965). For further information about an example of the use of the Astin selectivity score in empirical research on judicial decisionmaking, see Brudney, Schiavoni & Merritt, *supra* note 197, at 1703 & n.104; Schneider, *Empirical Research on Judicial Reasoning*, *supra* note 405, at 334 n.60. For 60 of the 1484 judicial participations, information on Astin scores was unavailable, either because the judge involved had not attended an undergraduate institution or had received an undergraduate degree from an unrated college. For these participations, a mean score was inserted to avoid excluding these participations as involving missing data.

<sup>408</sup> Brudney, Schiavoni & Merritt, *supra* note 197, at 1703 n.104 (explaining that “the early 1960s is an especially meaningful point in time for our judicial population” given that most of the judges in that study “graduated from college between 1943 and 1962 while only 29 graduated after 1962” and that “academic reputation changes slowly over time”); Schneider, *Empirical Research on Judicial Reasoning*, *supra* note 405, at 334 n.60.

<sup>409</sup> See *supra*, Tbls. 1–6.

<sup>410</sup> For further discussion of this subset of the Free Exercise/Accommodation model, see *supra* Part IV.A.2.

sought exemption from the rules or regulations imposed by educational authorities, a higher prestige level for the judge's undergraduate college was negatively associated (at the 95% probability level) with the outcome.<sup>411</sup> Perhaps attendance at an elite undergraduate institution promotes a secularist worldview that results in antipathy toward religious dissenters or alternatively perhaps those who had the greatest educational opportunities are most skeptical toward claims by those who may be regarded as seeking to undermine educational quality through religious exemptions from school policies.

### b. *Elite Law School*

Law school faculties in general,<sup>412</sup> and at the leading law schools in particular,<sup>413</sup> are unrepresentative of the general population ideologically and tend to be identified with liberal causes and attitudes. In addition, the lack of religious diversity, or more specifically, the small numbers of observant religious believers, on law school faculties has been noted by more than one scholar.<sup>414</sup> Most prior studies have failed to find that judges who attended more elite educational institutions were more or less conservative or liberal than other judges.<sup>415</sup> However, one recent study found that federal judges who had graduated from elite law schools were more likely to favor unions in labor law disputes, a finding that the study authors explained was "consistent with perceptions of elite law

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<sup>411</sup> The ASTIN selectivity variable was significant and negative (at the 95% probability level) in the focused regression run for the education subset of cases when the model included the common space score measure of judicial ideology, and fell just below significance (at the 94.5% probability level) when the party-of-appointing president was substituted as the measure of ideology.

<sup>412</sup> See Neal Devins, *The Interactive Constitution: An Essay on Clothing Emperors and Searching for Constitutional Truth*, 85 GEO. L.J. 691, 704 n.92 (1997) (reporting that 80.4% of law professors are Democrats, compared with 46.2% of full-time working population (citing James Lindgren, *Measuring Diversity*, Speech to the National Association of Scholars (Jan. 5, 1997)); Michael Stokes Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993, 1001 (1993) (observing "the lack of conservative legal scholars on [law school] faculties and the hugely disproportionate percentage of faculty members who are political Democrats"); Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2073 n.23 (1996) (reporting that 12.9% of law professors are Republicans, compared with 41.0% of working population (citing James Lindgren, *Measuring Diversity* tbl.2 (unpublished manuscript)).

<sup>413</sup> Christopher Wolfe, *The Ideal of a (Catholic) Law School*, 78 MARQ. L. REV. 487, 503 (1995) (stating that "political conservatives and traditional religious believers are so little represented at 'big-name' law schools"); Richard A. Posner, *Legal Scholarship Today*, 45 STAN. L. REV. 1647, 1652 (1993) (stating that "[t]he faculties of the leading American law schools are now substantially to the left of the judiciary . . . and of the public at large").

<sup>414</sup> Volokh, *supra* note 412, at 2071–72; Wolfe, *supra* note 413, at 503.

<sup>415</sup> George, *supra* note 33, at 28.

school faculties—and their graduates—as ideologically liberal and inclined to favor government regulation.”<sup>416</sup>

For each judge, attendance at an “Elite Law School” was coded as “1” and attendance at a “Non-Elite Law School” as “0.”<sup>417</sup> For this study, like our prior study of judicial decisions on the constitutional validity of the sentencing guidelines,<sup>418</sup> we denominated the following seven law schools as “Elite”: Chicago, Columbia, Harvard, Michigan, Stanford, Virginia, and Yale.<sup>419</sup> Of the 1484 judicial participations in our study for the larger models (the four theoretical models), 575 or 38.7% involved judges who attended elite law schools.

Our findings, or near-findings, with respect to attendance at elite law schools are uncertain and are offered with words of caution. Although the Elite Law School variable did not quite reach the standard 95% probability level to be regarded as statistically significant for any of the models, the variable came tantalizing close to statistical significance (the 94% probability level)<sup>420</sup> for two of the theoretical models—positive for the Anti-Political theoretical model,<sup>421</sup> and negative for the Judicial-Restraint theoretical model.<sup>422</sup> Thus, while we are reluctant to regard this result as a definitive finding, there is some tentative evidence that attendance at an elite law school influenced a judge—independent of other ideological measures—to be more willing to intervene judicially into the decisions made by the political branches of government and less willing to exercise judicial restraint.<sup>423</sup>

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<sup>416</sup> Brudney & Ditslear, *supra* note 197, at 598.

<sup>417</sup> Judges were coded according to the law school from which they received their first legal degree, thus not considering advanced legal degrees. Our theory was that the primary socializing effect of legal education is felt during the basic three-year experience leading to the initial legal degree.

<sup>418</sup> Sisk, Heise & Morriss, *supra* note 155, at 1418–19.

<sup>419</sup> Although any classification of law schools by prestige is unavoidably subjective, we attempted to add some objectivity by synthesizing rankings in the *Chicago-Kent Law Review*’s list of the schools with the most prolific (publishing) faculty, the *U.S. News & World Report* ranking, and the *Gourman Report* ranking, thereby including measures of faculty activity, popular reputation, and other factors in evaluating status. Our formula and the justifications for it are described in our earlier study. Sisk, Heise & Morriss, *supra* note 155, at 1418–19. In addition, as a rough estimate of which law schools have a national, rather than regional character, one additional school—Virginia—was distinctive in the large number of federal judges for whom it was alma mater and thus was added to our select list of elite law schools. *Id.*

<sup>420</sup> This variable reached the 94% probability level for two of the three permutation of standard variables for this model.

<sup>421</sup> See *supra* Tbl. 2.

<sup>422</sup> See *supra* Tbl. 3. Indeed, in an alternative regression analysis in which dummy variables for each of the individual appointing Presidents was substituted as the measure of ideology, the Elite Law School variable rose into statistical significance (at the 95% probability level) and as positively associated with the Anti-Political Model.

<sup>423</sup> The Elite Law School variable proved significant (at the 95% probability level) in one

## B. Political and Attitude Variables

### 1. Ideology

The political party of a judge's appointing President has long been a standard of empirical study of judicial decisionmaking.<sup>424</sup> The influence of this partisan or ideological variable should not be overstated; the most recent comprehensive study of the federal courts of appeals found a small difference between Republican- and Democratic-appointed judges in civil rights/liberties cases (which would include the religious freedom cases subject to our study).<sup>425</sup> Still, C.K. Rowland and Robert Carp, in their comprehensive study of district court judges, found a difference between Democratic- and Republican-appointed judges of 24% on religion cases.<sup>426</sup> Moreover, scholars have identified something of a religious chasm between the two major parties, with "the Republican party [] becoming the political home of religious traditionalists while the Democratic party is becoming increasingly attractive to religious liberals and secularists."<sup>427</sup>

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other ancillary regression run limited to appellate judges deciding Establishment Clause cases, and there the variable pointed in the opposite direction, negative, that is, associated with a tendency to reject Establishment Clause challenges to government actions. While this result appeared only in an ancillary run conducted only for purposes of cross-checking the model, its appearance in a context that contradicts the conclusion that attendance at an elite law school strengthens the hand of active judging further enhances our reluctance to declare this variable significant on the Anti-Political Model and our conclusion that additional studies of this variable are necessary.

<sup>424</sup> SONGER, SHEEHAN & HAIRE, *supra* note 35, at 103–04 (explaining that in studies of "specific linkages between policy preferences and judicial decision making," scholars long have employed partisanship as "at least [a] rough surrogate[] for certain policy preferences"); James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO ST. L.J. 149, 162 (2003) (describing the line of research since the 1960s indicating "that party affiliation is a significant predictor of voting patterns by federal judges").

<sup>425</sup> SONGER, SHEEHAN & HAIRE, *supra* note 35, at 115 (finding a difference of 6.4% in liberal voting on civil rights/liberties issues between Democratic- and Republican-appointed judges for the period of 1970–1988).

<sup>426</sup> ROWLAND & CARP, *supra* note 5, at 40 (finding difference between Democratic and Republican judges of 28% on race discrimination cases and 24% on religion cases); *see also id.* at 48–50 (finding some dramatic voting differences between Carter and Reagan appointed judges on such issues as race (60%) and right-to-privacy (33%)); Gottschall, *supra* note 8, at 53 (finding, in study of court of appeals judges, that when looking at results in the universe of both unanimous and non-unanimous cases, the margin of difference between appointees of Democratic and Republican presidents was 20% in civil rights and liberties cases and 10% in economic cases).

<sup>427</sup> Geoffrey C. Layman & Edward G. Carmines, *Cultural Conflict in American Politics: Religious Traditionalism, Postmaterialism, and U.S. Political Behavior*, 59 J. POL. 751, 753 (1997).

For each judge, appointment by a Republican President is coded as "1", and by a Democratic President as "0". Of our 1484 judicial participations, 36.7% (or 544) involved judges appointed by a Democratic President, and 63.3% (or 940) involved judges appointed by a Republican President. In a separate analysis not reported by table in this Article, we also included an alternative coding of judicial policy preferences, involving an assignment of a "common space" ideological score to judge, based upon common space scoring of appointing Presidents and home state Senators of the same political party. Micheal Giles, Virginia Hettinger, and Todd Peppers adapted these scores for use in study of judicial behavior<sup>428</sup> and generously shared that data with us. In a future study, we will report further findings and offer a further analysis of the interplay and contrast between these two different statistical attempts to measure judicial ideological preferences. As a general finding, however, both measures produced consistent indications of statistical significance.

In most aspects of our study, while religious affiliation variables were prominent and significant, both traditional partisan and the newly-formulated common-space score measures of judicial ideology faded into the background. Indeed, ideology was not significant in evaluating any of the four theoretical and integrated models for understanding the Religion Clauses of the Constitution.<sup>429</sup> In sum, with the exceptions noted below, ideology did not prove to be a substantial factor in understanding judicial behavior in religious freedom decisions, and certainly was not nearly as consistent an influence as the religion-based variables included in our study.

However, ideology emerged as significant in two discrete areas, each of which implicates aspects of the Church and State debate that have been very visible in political terms. First, in a focused analysis of Free Exercise/Accommodation claims arising in the educational context,<sup>430</sup> religious parents or children seeking accommodation by school or governmental authorities of their religious beliefs or practices were significantly more likely to be favorably received by judges appointed by Republican Presidents (at the 95% probability level). This result is not surprising, given that conservatives in recent years have been most critical of the educational establishment and frequently bemoan the exclusion of religious influences from public educational institutions; likewise, conservatives have been protective of the rights of private schools to operate with minimal governmental oversight.

Second, looking to the general Establishment model,<sup>431</sup> judges appointed by Republican Presidents (at the 95% probability level) were significantly *less* likely

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<sup>428</sup> Micheal W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623 (2001).

<sup>429</sup> See *supra* Part II.

<sup>430</sup> See *supra* Part IV.A.2.

<sup>431</sup> See *supra* Part IV.B.1.



to sustain Establishment Clause challenges to governmental actions that affirmatively recognized religion or facilitated religious elements in public life.<sup>432</sup> Given that the Republican or conservative political position in recent years has been one that decries the exclusion of religion from public life and that supports official acknowledgment of the religious sensibilities of the majority of Americans, judges from that side of the political spectrum would be expected to respond in this way to Establishment Clause litigation.

The proper role of religion in the area of education and the general question of whether, how, and when government may acknowledge and affirmatively accommodate the religious sentiments of the majority have been perhaps the most visible and hotly contested points of the Church and State debate in the American political realm. Thus, if partisan or liberal-conservative influences were to be felt, one would anticipate they would emerge in this area, as in fact they did in our study.

## 2. American Bar Association Rating

The American Bar Association's (ABA) Standing Committee on the Federal Judiciary evaluates the qualifications of persons considered for appointment to the federal courts.<sup>433</sup> For many years, the Committee rated prospective nominees on the following scale: "Exceptionally Well Qualified," "Well Qualified," "Qualified," and "Not Qualified."<sup>434</sup> As of 1991, the Standing Committee modified its rating of prospective nominees to eliminate the "Exceptionally Well Qualified" rating and instead provides one of three ratings, "Well Qualified," "Qualified," or "Not Qualified."<sup>435</sup> In addition, if a minority of the Standing Committee rates the prospective nominee differently, that minority conclusion is reported as a "split rating." For example, a "split rating of *Qualified/Not Qualified*" means that a majority or substantial majority of the committee votes a *Qualified* designation but one or more members dissent and vote *Not Qualified*.<sup>436</sup>

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<sup>432</sup> See *supra* Tbl. 6.

<sup>433</sup> For a description of the Standing Committee and its rating of potential nominees for federal judgeships, see *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 443-45 (1989).

<sup>434</sup> See, e.g., AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 4-5 (1983) (briefly describing each rating); AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 4-5 (1980) (same); AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 9-10 (1977) (same).

<sup>435</sup> See AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 7 (1991) (explaining three possible ratings of prospective judicial nominees).

<sup>436</sup> Goldman, *supra* note 156, at 320.

The Standing Committee has been criticized as biased in its process on a number of bases, including race, gender, religion, and practice background.<sup>437</sup> It also has been criticized for allowing the practice of split rating votes to be turned to political purposes. The most controversial example of this purported politicization of the Committee was the minority rating of "Not Qualified" given to Supreme Court nominee Robert H. Bork in 1987—allegedly based upon disagreement with his views on constitutional principles rather than his professional qualifications—by four members of the Standing Committee who were identified in the press as political opponents of the Reagan administration.<sup>438</sup>

More recently, James Lindgren examined data on confirmed nominees to the federal courts of appeals during the Bush and Clinton administrations and reported "strong evidence of differential treatment of nominees by the ABA's rating committee."<sup>439</sup> Specifically, Lindgren found that among nominees "without the central qualification—prior judicial experience—the Clinton appointees appeared to get an extremely strong boost just for being appointed by Bill Clinton, rather than by George Bush."<sup>440</sup> Bush appointees with very strong credentials, such as both private and government experience, graduation from a top law school, etc., had a lower chance of getting the highest ABA rating than

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<sup>437</sup> Historically, the committee has given lower ratings to female and minority nominees. Roger E. Hartley, *Senate Delay of Minority Judicial Nominees: A Look at Race, Gender, and Experience*, 84 JUDICATURE 190, 195 (2001); John R. Lott, *The American Bar Association, Judicial Ratings, and Political Bias*, 17 J.L. & POL. 41, 47–49 (2001); Elliot E. Slotnick, *The ABA Standing Committee on Federal Judiciary: A Contemporary Assessment—Part 2*, 66 JUDICATURE 385, 387 (1983); see also Henry J. Reske, *ABA Judicial Ratings Draw Fire*, 80 A.B.A. J. 38, 38–39 (1994), (reporting the liberal charge that "the ABA's system for evaluating judges is erratic, racist and weighted in favor of lawyers who have worked for silk-stocking firms"). Incidents of apparent religious discrimination by the Committee have been reported. Victor Williams, *The ABA Judgemaker Committee is Exposed, Albeit Shaded From FACA Sunshine*, 12 GEO. MASON L. REV. 249, 260–62 (1990). Others view the Committee as elitist as well as biased in favor of those with prior judicial experience and trial lawyers. HENRY R. GLICK, COURTS, POLITICS, AND JUSTICE 141 (3d ed. 1993) ("Critics complain that the ABA procedures are highly elitist, since the committee mainly consults prominent lawyers and presidents of local bar associations in producing its judicial ratings."); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing as Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 19 (1993) (criticizing preference of Committee for former judges and trial lawyers).

<sup>438</sup> Williams, *supra* note 437, at 264–66 (discussing the ABA Committee's rating of Judge Bork, with citations to Senate reports and reports in various newspapers and legal periodicals); see also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 292–93 (1990) (describing the ABA Committee's split vote as "extremely damaging to [his] nomination since the judgment was nominally about professionalism" and attributing this action to political opponents on the Committee).

<sup>439</sup> James Lindgren, *Examining the American Bar Association's Rating of Nominees to the U.S. Courts of Appeals for Political Bias, 1989–2000*, 17 J.L. & POL. 1, 3 (2001).

<sup>440</sup> *Id.* at 6.

Clinton appointees who had none of those credentials.<sup>441</sup> Lindgren concluded that “the patterns revealed in the data are consistent with a conclusion of strong political bias favoring Clinton nominees.”<sup>442</sup> John Lott, in a similar study, confirmed Lindgren’s findings,<sup>443</sup> but said that the picture must be balanced by the finding that white Republican appointees with past judicial experience were twenty percentage points or more likely to be rated as “Well Qualified” by the ABA than were white Democratic appointees with similar backgrounds.<sup>444</sup> Nonetheless, while considerably more cautious in expressing a conclusion, Lott agreed that the evidence “does tend to point weakly” in the direction of political bias.<sup>445</sup>

Because of these doubts that the ABA Standing Committee ratings constitute accurate or objective evaluations of the professional qualifications of judicial nominees, we have not relied upon ABA ratings as a measure of the qualifications of judges but rather regard them as a proxy for a judge’s attitudes. Indeed, in our prior study of judicial responses to constitutional challenges to the sentencing guidelines, we found that “judges with higher ABA ratings . . . were significantly more likely to strike out from the mainstream and adopt marginal theories in their path to the outcome.”<sup>446</sup> We suggested that “the ABA ratings may have the effect of playing to the ego of some judges who fare well in the process,” that is, the recipient subjectively may perceive a high rating as further evidence of his or her own exceptional qualifications.<sup>447</sup> In sum, whether as a result of a liberal political bias by the ABA Standing Committee or because the judge who receives a higher ABA rating may perceive him or herself as having been endorsed as a person of greater ability, judges with higher ABA ratings, “may tend to be bolder in action, more willing to blaze a new trail through the law, more *activist* in the judicial role. In other words, the ABA rating may be the insignia for, or even an intensification of, the confident over-achiever who is compelled to distinguish himself.”<sup>448</sup>

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<sup>441</sup> *Id.* at 19.

<sup>442</sup> *Id.* at 26. For a critique of the methodology of the Lindgren study, but which does not include a new study reaching different results, and the response to that critique, see Michael J. Saks & Neil Vidmar, *A Flawed Search for Bias in the American Bar Association’s Ratings of Prospective Judicial Nominees: A Critique of the Lindgren Study*, 17 J.L. & POL. 219 (2001); James Lindgren, *Saks and Vidmar: A Litigation Approach to Social Science*, 17 J.L. & POL. 255 (2001); Michael J. Saks & Neil Vidmar, *Asserted But Unproven: A Further Response to the Lindgren Study’s Claim that the American Bar Association’s Ratings of Judicial Nominees are Biased*, 19 J. L. & POL. 177 (2003).

<sup>443</sup> Lott, *supra* note 437, at 46.

<sup>444</sup> *Id.* at 50.

<sup>445</sup> *Id.* at 53.

<sup>446</sup> Sisk, Heise & Morriss, *supra* note 155, at 1481.

<sup>447</sup> *Id.* at 1482.

<sup>448</sup> *Id.*

For coding purposes, we created three dummy variables: (1) “ABA-Above Qualified,” which consists of those judges receiving either of the two above qualified ratings, i.e., Exceptionally Well Qualified and Well Qualified; (2) “ABA-Qualified,” which consists of those judges who were rated Qualified; and (3) “ABA-Below Qualified,” which consists of those judges receiving a below qualified rating of either Not Qualified or the split rating of Qualified/Not Qualified.<sup>449</sup> We obtained the data on the ABA ratings of judges included in our study from the on-line multi-user database created by Wendy Martinek, from Sheldon Goldman, and from various other sources. In our regression analyses, we excluded ABA-Qualified as the reference variable.

Of the 1484 judicial participants in our larger models (the four theoretical models), 938 or 63.2% received ratings above qualified, 395 or 26.6% received qualified ratings,<sup>450</sup> and 151 or 10.2% received below qualified ratings.

The ABA dummy variables did not prove significant in any of our models<sup>451</sup> and emerged as significant only in an ancillary regression of trial judges for the Establishment decisions set, a regression analysis conducted primarily for cross-check purposes and which both had a very small N count and generated multicollinearity problems.

### 3. Seniority

In prior research, the hypothesis has been that years of seniority on the bench “test hardening not of the biological arteries [as would age] but rather of the bureaucratic judicial arteries.”<sup>452</sup> In our prior study of judicial decisions on the

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<sup>449</sup> A “split rating” reflected a division on the Committee between any two ratings, and the dissenting minority may have believed the prospective nominee deserved a higher, as opposed to a lower, rating than the majority. For purposes of this study, we have only recorded split ratings when the Standing Committee divided between “Qualified” and “Not Qualified” (recorded for this study as “Q/NQ”). As Sheldon Goldman explains, “[t]he ABA committee insists that anyone receiving a *Qualified* rating, even if there is dissent among some members, is fully qualified for the federal bench. Yet there is the suspicion that those receiving this split rating are only marginally qualified.” Goldman, *supra* note 156, at 320.

<sup>450</sup> Three judges, one appointed by President Eisenhower and two appointed by President Johnson, were not rated by the ABA Committee. For this study, each was assigned a rating of “Qualified” (thus placing the judge into the middle category and the reference variable) to avoid eliminating that judicial participation as involving missing data.

<sup>451</sup> See *supra* Tbls. 1–6.

<sup>452</sup> Goldman, *supra* note 6, at 499. Goldman found little relationship between years of judicial experience and judicial voting behavior in that study. *Id.* Because a judge’s age of course is highly correlated with the length of a judge’s service on the bench, see Sisk, Heise & Morris, *supra* note 155, at 1432 n.232, we could not include both in the same regression analysis. Our own prior study as well as other recent studies have found age to be of no value in explaining judicial behavior. *Id.* at 1459–60; George, *supra* note 33, at 17 (explaining that “the studies suggest that age is of minimal value in predicting how judges will vote, particularly

constitutionality of the sentencing guidelines, we found that longer tenure on the bench positively correlated with practical (rather than theoretical) reasoning as reflected in written opinions and negatively correlated with adoption of originalism as a constitutional interpretive approach.<sup>453</sup> Based upon this, we suggested “that greater seniority tends to make a judge more worldly-wise (practical) and less taken with jurisprudential trends (nonoriginalist).”<sup>454</sup>

The factor of Seniority on the federal bench was in our study coded by number of months from date of appointment to the date of the judge’s judicial participation.

As discussed earlier,<sup>455</sup> the seniority or time on the bench of the deciding judge was significantly associated (at the 95% probability level) with adoption of the Anti-Political Model for interpreting the Religion Clauses of the Constitution.<sup>456</sup> The longer that a judge had served on the federal bench, the more likely that the judge would fall into the Anti-Political framework. Based upon this finding, we suggest that judges over time develop a greater confidence in the judicial role and a greater comfort in the constitutionally-protected independence of the federal judiciary afforded by life-long tenure so as to more readily set aside the constitutionally dubious decisions of government. Stated alternatively, with the passage of time, federal judges may become less restrained against rendering decisions that interfere with the actions of the political branches of federal, state, or local government.

### C. Prior Employment Variables

As Lee Epstein, Jack Knight, and Andrew Martin have said, empirical research has “show[n] career path to be an important factor in explaining judicial choices.”<sup>457</sup> They described the results of prior research as follows:

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once other variables are considered”). For that reason and because experience on the bench hypothetically seemed “intuitively more meaningful” in impact on decisions than age, Schneider, *Assessing and Predicting*, *supra* note 383, at 488 n.53, we adopted seniority on the bench as the variable for study in preference to chronological age.

<sup>453</sup> Sisk, Heise & Morriss, *supra* note 155, at 1486.

<sup>454</sup> *Id.* at 1486–87.

<sup>455</sup> See *supra* Part II.B.3.

<sup>456</sup> See *supra* Tbl. 2.

<sup>457</sup> Lee Epstein, Jack Knight & Andrew D. Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903, 905 (2003) (arguing that the increasing trend toward considering only sitting federal judges as potential nominees to the Supreme Court, thus establishing a norm of career homogeneity, negatively affects judicial decisionmaking by depriving the Court of the benefit of perspectives from diverse career paths).

Whether the authors approached career path in specific ways (e.g., legal experience representing management) or more general ones (e.g., any experience in private practice) or whether they sought to account for the vote, legal reasoning, or some other feature of judicial decision making, they generally found that career experience influenced judicial decision making.<sup>458</sup>

### 1. *Military Service*

Military experience has received little attention in empirical studies as a potential influence on judicial behavior.<sup>459</sup> In our prior study of federal judicial responses to constitutional challenges to the federal criminal sentencing guidelines, we found that former military service was significantly and strongly correlated with judicial resistance to a particular legal argument that would have required effectively revising the plain language of the statute at issue.<sup>460</sup> Based upon this reluctance to alter the express direction of a statute, we concluded “that a former soldier recognizes a direct order when he hears it.”<sup>461</sup>

For purposes of the present study of decisions on religious freedom, we postulate that a military background would condition a person to be accepting of significant regulation (commanding a high degree of uniformity in activities and behavior) and the loss of individual discretion, as well as having a greater level of deference to governmental authority. Thus, a plausible hypothesis is that those judges who had served in the military would be less likely to accept free exercise claims in which the claimant requested individually-tailored accommodations and exemption from generally-applicable rules, but would be more likely to accept governmental actions that affirmed or acknowledged religion as part of public life.

For each judge, the Military service variable is coded as “1,” and the absence of such service as “0.” Of the 1484 judicial observations in our larger models (the four theoretical models), 944 or 63.6% involved judges who had served in the nation’s armed forces.

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<sup>458</sup> *Id.* at 956.

<sup>459</sup> In a study of criminal sentencing nearly thirty years ago, Beverly Blair Cook hypothesized that judges with military experience would impose more severe punishment, but in fact found the opposite. Beverly Blair Cook, *Sentencing Behavior of Federal Judges: Draft Cases—1972*, 42 U. CIN. L. REV. 597, 624 (1983). Given the particular context of sentences for military draft offenders, she concluded that “more lenient sentences [by a judge with military experience might be] compensation for his known association with the military” or that he might have “no motivation to prove his devotion to national security by giving severe sentences since he already had earned his credentials.” *Id.* at 624–25. That prior study thus provides little guidance in formulating a hypothesis for the effect of military background in other situations.

<sup>460</sup> Sisk, Heise & Morriss, *supra* note 155, at 1478–79.

<sup>461</sup> *Id.* at 1479.

Prior service in the military did not appear as significant in any of our standard models. When appellate judges only were evaluated in an ancillary regression run, the Military variable was significant at the 95% probability level and was negatively associated with claims under the Free Exercise/Accommodation model; this negative association and significance for appellate judges emerged as well with ancillary regression runs for the Pro-Religion and Anti-Political theoretical models. In each instance, the influence is in the anticipated direction, that is, prior service in the military is negatively associated with claims by those seeking exemption from the general rules applicable to others, that is, those seeking dis-uniform application of the laws. However, because the appellate-judge-only regression run was conducted for cross-check purposes only and because the Military variable fell below the 90% probability level in all of our models using standard sets of variables, we regard this ancillary result as intriguing and a justification for further study in the future.

## 2. Government Service

Prior governmental experience would presumably make a person “more deferential to governmental bodies.”<sup>462</sup> When, as in the cases examined in this study, a direct challenge is being made to a decision by a governmental body as to how to operate a program, enforce a regulation, or conduct a public activity, one might expect individuals whose employment background fostered an identification with governmental entities to be more likely to find official decisions to be well-considered and properly undertaken.

For each judge, prior employment or service experience in government was coded as “1,” and the absence of such as “0.” For this Government variable, we included local, state, or federal elective office, other than elected judgeships which are coded separately; appointment to an administrative or political staff position at the local, state, or federal level; and employment (full- or part-time) as a government lawyer.<sup>463</sup> For purposes of this study, we defined this Government

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<sup>462</sup> Jilda M. Aliotta, *Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking*, 71 JUDICATURE 277, 279 (1988); see also HOWARD, *supra* note 156, at 169 (concluding, based upon interviews with judges, that “[t]he most active former politicians, contrary to lawyers' myths, did not become judicial activists”).

<sup>463</sup> We included in this category those who had prosecution experience at the state or federal level, agents of the Federal Bureau of Investigation, and lawyers for federal or state government agencies. We did not include attorneys who, in private practice with a law firm, may have had governmental clients, both because identifying the nature of each of a firm's clients would be burdensome in data-gathering and because we believe that the kind of identification with the government that we are attempting to measure is less likely to be manifested by a lawyer who is not employed by the government but merely has represented governmental entities among a stable of other clients in private practice.

service variable broadly to include all forms of association with any form of government in either public office or employment (but not political campaign activity) because our purpose was to measure identification with government as an actor in society. For obvious reasons, holding a position as a judge, although a form of government service, should be treated differently, because the role of the judge is as an impartial magistrate and presumably does not involve the same level of identification with or loyalty to the government (although we question this assumption below).<sup>464</sup>

Of the 1484 judicial observations in our larger models (the four theoretical models), 887 or 59.8% had prior government service.

The Government employment background variable did not prove significant in any of our models.<sup>465</sup>

### 3. State or Local Judge

As observed by Sheldon Goldman, starting with the Carter Administration and continuing at least through the Reagan and Bush Administrations, the proportion of federal district court appointees with prior state or local judgeship experience has increased, bringing about a “growing professionalization of the federal judiciary.”<sup>466</sup> That trend toward a career judiciary had begun even earlier among appointees to the federal appellate courts, where for more than half a century a majority of nominees have had prior judicial experience.<sup>467</sup>

In prior studies, court experience prior to ascending to the federal bench has infrequently been an explanatory factor with respect to judicial behavior.<sup>468</sup> A few prior studies have related judicial experience to judicial liberalism.<sup>469</sup> The standard hypothesis has been that “the insulation from popular sentiments that the

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<sup>464</sup> For discussion of prior service as a state or local judge as a variable, see *infra* Part V.C.3.

<sup>465</sup> See *supra* Tbls. 1–6.

<sup>466</sup> GOLDMAN, PICKING FEDERAL JUDGES, *supra* note 313, at 350–51 (observing, beginning with the Carter Administration, that a shift has occurred in which a larger proportion of district judges have judicial rather than prosecutorial experience).

<sup>467</sup> *Id.* at 353.

<sup>468</sup> HOWARD, *supra* note 156, at 182–83 (finding in study of circuit judges’ votes across multiple fields that prior judicial experience was significant only on discrete issue of civil rights); Ashenfelter, Eisenberg & Schwab, *supra* note 156, at 277–81 (finding that individual judge characteristics, including prior judgeship, did not appear to influence substantially the mass of cases decided by district court judges); Gerard S. Gryski & Eleanor C. Main, *Social Backgrounds as Predictors of Votes on State Courts of Last Resort: The Case of Sex Discrimination*, 39 W. POL. Q. 532 (finding that prior career characteristics of judges were “not useful predictors of state high court judicial behavior in sex discrimination cases”).

<sup>469</sup> Aliotta, *supra* note 462, at 278–80; see also Eisenberg & Johnson, *supra* note 235, at 1190 (finding judges with prior judicial experience treated racial equal protection claims more favorably).



judicial office often provides” should make a judge with prior judicial experience “more willing to support potentially unpopular claims.”<sup>470</sup> As an alternative hypothesis, one might ask whether the trend toward a more professional judiciary—that is, a federal bench that is heavily made up of those with prior state or local judicial experience—might “lead to a more technocratic, bureaucratic, bloodless judiciary,” that is, one that is somewhat more passive and less likely to engage in policy-oriented decisions.<sup>471</sup>

In our prior study of judicial responses to constitutional challenges to the federal criminal sentencing guidelines, we expected federal judges who had become even more accustomed to the independent judicial role through prior state or local judging to be more willing to set aside a popular reform like the Sentencing Reform Act if they believed it offended constitutional principles.<sup>472</sup> Even more importantly, the sentencing guidelines were accurately perceived as a direct reduction in judicial discretion and thus judicial power. Judges with a stronger role identification, enhanced by prior judicial experience at the state and local level, presumably would have been more offended by the restraints of the guidelines.<sup>473</sup> Notably, our findings in that study suggested precisely the opposite. Prior judicial experience at the state or local level was indeed significantly correlated, but in the unanticipated direction of greater approval of the sentencing guidelines.<sup>474</sup>

We found it difficult to account for this result. We asked whether state and local judges, particularly if subject to electoral approval, might be more deferential to the product of the political branches, such as the sentencing guidelines. But surely, we countered, even elected state and local judges are less immediately responsive to popular control than ordinary politicians. Yet prior political experience was not a significant factor in our study of sentencing guidelines decisions, while prior judicial experience had proven to be. Could it then be that state and local judges are more constrained in available choices and thus less accustomed to judicial discretion (and accordingly less aggrieved by its loss)? Or perhaps because state judges enjoy less independence and accord greater deference to prosecutors at the sentencing phase, former state judges are less likely to find fault with a sentencing system that shifts power away from the

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<sup>470</sup> Aliotta, *supra* note 462, at 279 (speaking of Supreme Court Justices with prior judicial experience).

<sup>471</sup> GOLDMAN, PICKING FEDERAL JUDGES, *supra* note 313, at 364 (raising the question of whether the trend toward a professional judiciary might lead to a more bureaucratic bench in which courts are relegated “to the outer margins of public policy” or whether the political nature of the appointment process will ensure that even a career judiciary “will continue to exercise discretion in a policy-oriented direction”).

<sup>472</sup> Sisk, Heise & Morriss, *supra* note 155, at 1477.

<sup>473</sup> *Id.*

<sup>474</sup> *Id.* at 1477–78.

bench and toward the prosecution? We concluded that a satisfactory answer was difficult to formulate.<sup>475</sup>

However, our prior study certainly did suggest that the effect of prior judicial experience cannot be dismissed in empirical study and bears further investigation in other contexts. Accordingly, we have included it in this study. Under the traditional hypothesis, one would expect that federal judges with prior state or local judicial experience would be more willing to uphold claims, whether based on the Free Exercise Clause or Establishment Clause, against governments. However, based both upon the growing professionalization of the judiciary as noted above and given the somewhat counter-intuitive results from our prior study, we also offer the contrasting hypothesis that judges who served on state or local benches may develop an attitude of greater restraint or greater deference to governmental decisions than those individuals who ascend directly to the federal bench from legal practice.

For each judge, prior service as a state or local judge was coded as "1" and the absence of such as "0."<sup>476</sup> Of the 1484 judicial observations in our larger models (the four theoretical models), 427 or 28.8% had prior service as a state or local judge.

The former state or local Judge variable proved significant on only one subset model, that involving claims of unequal or discriminatory treatment by claimants within our Free Exercise/Accommodation model. The Judge variable was quite significant (at the 99% probability level) and negatively correlated with such claims. Thus, judges who had formerly served on the state or local bench were distinctly less likely to pass favorably upon those who claimed discriminatory treatment on account of their religious beliefs or practices. Two possible explanations suggest themselves. First, consistent with our alternative hypothetical, former state and local judges may indeed be more deferential to the judgments of actors in the political branches. However, it is difficult to understand why that deference to the political branches would be manifested only in the context of claims of unequal treatment and not reveal itself in the multiple other contexts of our decisions where challenges also were made to decisions of federal, state, or local government. Second, perhaps those who had previously served on state or local courts tend to become somewhat more skeptical through experience of those who complain that they have been treated unfairly, sometimes regarding these allegations as excuses for personal failures.

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<sup>475</sup> *Id.* at 1478.

<sup>476</sup> This category thus includes state, county, and municipal judgeships, but not federal adjunct judicial positions such as bankruptcy judge or magistrate.

## VI. CONCLUSION

Given the general legal audience likely to receive the report of an empirical study when published in a law journal, we wish to close our discussion by emphasizing that any study, and especially one focused upon the behavior of human actors and the multifarious elements of complex matters, of course must be understood in context and as subject to inherent qualifications and limitations in interpretation and application.

First, this study, focused as it was on cases in which religion was central to the dispute, was consciously designed to unveil any relationship between religious variables and judicial outcomes, if such existed. Thus, the salience of a religious-oriented variable in this context cannot be projected into any other context without further study. The significance of religious variables in religious freedom cases may or may not suggest similar patterns in the study of judicial responses to other types of legal disputes.

Second, the design of an empirical study itself is a human enterprise, in which choices must be made, subject to general guidelines, including identifying the subject of the study, collecting and organizing the data, transforming observations into mathematical constructs (coding), etc. In this Article, we have laid out our design and the choices we made at each stage of the study in transparent detail so that the reader may evaluate the wisdom of the judgments we made.

Third, for the reader not familiar with the language of statistics, “significance” as used in this Article does not necessarily mean substantial in degree of effect. When an independent variable is found to be “significant” in a statistical sense for an empirical study, it means that its influence upon the dependent variable appears to be real and is not likely a product of mere random chance. But a finding that an independent variable is significant at a certain probability level does not necessarily mean that this variable standing alone explains more than a small part of the variation on the dependent variable.

Fourth, the general reader also should be cautioned that identification of variables that are statistically significant when examining a large set of judges and decisions does not necessarily suggest a cause-and-effect relationship and cannot be used to predict that any individual judge with particular characteristics will rule in a predetermined way in any specific case. Our study identifies general tendencies, not individual determinants.

Fifth, we have offered possible explanations (and sometimes alternative explanations) for the association of particular independent variables with dependent variables, and have attempted to ground those interpretations in the social science and legal literature. However, the informed reader always is entitled to judge whether those explanations are persuasive. The findings are the product of mathematical formulas; the interpretations offered are just that—interpretations.

In our study of religious freedom decisions, the single most prominent, salient, and consistent influence on judicial decisionmaking was *religion*—religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community. If confirmed by other studies in the future, our findings indicate that, viewing the federal judiciary collectively and evaluating the tipping point of difficult and contested religious freedom cases at the margins, religious factors are meaningfully associated with judging outcomes.

Even with the caveats mentioned above, we feel justified in offering this general conclusion: when searching for the soul of judicial decisionmaking in the legal or political sense, empirical scholars must not neglect the presence and influence upon the judicial process of matters that affect the soul in the theological sense.